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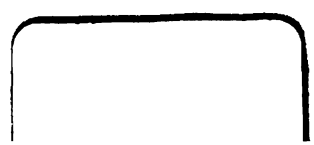
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Jan 7

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REPORTS

OF

CASES ARGUED AND DETERMINED

IN

THE SUPREME COURT OF TENNESSEE,

DURING THE YEARS

1839-40.

—
BY WEST H. HUMPHREYS,
STATE REPORTER.



VOLUME I.

—
NASHVILLE:
J. GEO. HARRIS, STATE PRINTER.

1841.



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Entered according to act of Congress, in the year 1841, by WEST H. HUMPHREYS, in the
Clerk's office of the District of West Tennessee.

ERRATA.

Page 7, line 7 from the bottom, for "mites" read "metes."

" 9, line 2, for "them" read "the land."

" 11, line 3 from the bottom, insert the word "must" between the words "they have."

" 13, line 4, for "seizure" read "seizin."

" 74, line 16, for "valid" read "invalid."

" 118, line 16, for "facts" read "cases."

" 227, bottom line, for "cestue" read "cestui."

" 301, line 5, for "monies" read "money."

" 362, line 22, for "was" read "were "

" 361, line 39 from bottom, for "change" read "charge."

JUDGES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS:

HONORABLE NATHAN GREEN,

“ WILLIAM B. REESE,

“ WILLIAM B. TURLEY.

WEST H. HUMPHREYS, Attorney General.

INDEX OF CASES.

A		Dement, Agee <i>vs.</i>	332
Agee <i>vs.</i> Dement	332	Dickerson <i>vs.</i> Wheeler	51
Anderson <i>vs.</i> Patten and Low-		Drane, Bayliss, <i>et ux</i> , <i>vs.</i>	174
der	369	E	
Anderson, Carroway <i>vs.</i>	61	Elledge <i>vs.</i> Todd	43
Arthur and Toby, Ewing <i>vs.</i>	537	Enloe <i>vs.</i> Hall	303
Atkins, Jenkins <i>vs.</i>	294	Ewing <i>vs.</i> Arthur and Toby	537
Atkinson <i>vs.</i> Micheaux	312	F	
Atkinson <i>vs.</i> Tucker	300	Farris <i>vs.</i> Kilpatrick	379
B		G	
Banks <i>vs.</i> Wilks	279	Gaines <i>vs.</i> Catron	514
Bayless <i>vs.</i> Drane	174	Gardner & Mosley <i>vs.</i> Brown	354
Beasley, Mayor of Columbia <i>vs.</i>	232	Gift <i>vs.</i> Hall and Simpson	480
Bennet <i>vs.</i> Baker	399	Goin, Murphey <i>vs.</i>	440
Berryhill's <i>ex'rs vs.</i> M'Kee's		Gass <i>vs.</i> Malony	452
<i>ex'rs</i> and Greenway	31	Graham <i>vs.</i> Smith	546
Bledsoe <i>vs.</i> Chouning	85	Gray, Parrish <i>vs.</i>	88
Boyers <i>vs.</i> Pratt	90	Gregory, <i>vs.</i> Burnett, <i>et ux</i>	60
Branch, Horsely <i>vs.</i>	199	H	
Brown <i>vs.</i> Johnson	261	Hall, Enloe <i>vs.</i>	303
Brown, Gardner & Mosely <i>vs.</i>	354	Hall, Gift <i>vs.</i>	480
Burnett, <i>et ux</i> , Gregory <i>vs.</i>	60	Hannum <i>vs.</i> Wallace	443
Byrd <i>vs.</i> Curlin	466	Hare, Kelly <i>vs.</i>	163
C		Hart, Pilcher <i>vs.</i>	524
Cage <i>vs.</i> Hogg	48	Hays <i>vs.</i> Hays	402
Carroway <i>vs.</i> Anderson	61	Hogg, Cage <i>vs.</i>	49
Catron, Gaines <i>vs.</i>	514	Horsely <i>vs.</i> Branch	199
Chouning, Bledsoe <i>vs.</i>	85	Hull, Normont <i>vs.</i>	320
Cochran <i>vs.</i> Brown and Crews	329	Humes & Williams <i>vs.</i> Mayor	
Cooley, Valentine <i>vs.</i>	38	&c. of Knoxville	403
Crockett <i>vs.</i> Latimer	272	Hunt <i>vs.</i> Watkins & Winbush	498
Crothwait <i>vs.</i> Ross	23	I	
Crutchfield <i>vs.</i> Stewart	380	Insurance Co., Marshall and	
Curlin, Byrd <i>vs.</i>	466	Hartshorn <i>vs.</i>	99
D		Irwin <i>vs.</i> Planters Bank	145
Deer, <i>et ux</i> , <i>vs.</i> Devin	66	Insurance Co., Stewart <i>vs.</i>	242

There will be found reported in this volume the cases of the April term, 1839, at Jackson, and of the July term, in the same year, at Knoxville; cases which were adjudicated before the present reporter came into office.

The reasons which produced their position in this volume it is not necessary here to explain.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF TENNESSEE:

NASHVILLE: DECEMBER TERM, 1839.

LONDON vs. LONDON.

Where a widow filed her bill charging her deceased husband with selling and conveying his land with intent to defraud her of her dower, and praying dower, and damages for the detention thereof, and the chancellor submitted both the validity of the deed and the quantum of damages to a jury: Held, that the submission of the matter of damages to the jury was not in accordance with chancery practice. The validity of the deed being settled by the verdict of the jury, the court should give relief by assigning dower and taking all proper accounts between the parties.

NASHVILLE,
December, 1839:
London
v
London.

The finding of the jury does not preclude the court from calculating and ascertaining for itself the true amount of damages.

Pamelia London filed her bill in the chancery court at Columbia in the year 1838, against John London, praying a decree for dower and damages.

The bill alleges that complainant was the widow of John London, deceased, who died intestate in the county of Maury; in the year 1832; that John London, deceased, was the owner in 1831, and for a number of years previous thereto, of a tract of land lying on Globe creek, in that part of Marshall county which constituted a part of Maury county previous to the establishment of Marshall, containing about one hundred and fifty acres; that in the year 1831 he made a fraudulent sale of the land to his son, John London, with the purpose and intent to cheat and defraud complainant of her dower in the said land; that John London, senior, died in

NASHVILLE,
December, 1839.

London
v
London.

1832, leaving no other lands of which complainant could be endowed, and that John London, jr., had, from the death of his father John London, held possession of the said land, and received the profits thereof.

On the 3d of September, 1838, John London filed his answer: 1st. He alleged that the complainant was the wife of John London, deceased, but that she was guilty of adulterous practices, and that in consequence thereof a separation took place, which continued till the death of her husband, in 1832.

2d. He alleged that John London, deceased, had been the owner, as stated in the bill of complainant, of the tract of land therein described, and that John London, deceased, did sell the said land to him; that the sale was made in good faith, and was not fraudulent nor with the intent to defeat the complainant of her dower; that he agreed to give twelve hundred and seventy-five dollars for the land, paid seventy-five dollars at the time of sale, and executed twelve notes for the balance, payable in twelve annual instalments; that he subsequently took up the five notes first due by the execution of a deed to his father, John London, deceased, for ninety acres of land, valued at five hundred dollars; that the purchase was made with the view of providing a place of residence for the complainant and her children; that the premises were in a ruinous and dilapidated condition when he took possession of them, and that they would not have rented for eighty dollars per annum, and that he made valuable improvements thereupon.

At the January rules, 1839, the complainant filed a general replication. The following is a statement of the material facts as disclosed by a mass of minute testimony.

John London, deceased, married complainant in the State of North Carolina, and lived with her a number of years. They had seven children. They removed to the State of Tennessee, and John London purchased in the county of Maury a tract of land on Globe creek, containing about the number of one hundred and fifty acres. For several years before his death he became much addicted to intoxication, and at times was exceedingly abusive to complainant. His

ill temper and habits of intoxication were increased by the belief that complainant was unchaste and had committed adultery. Their house was the scene of constant broils, and separations occasionally took place for short periods. His dissatisfaction increased, and he informed several persons that his wife was unfaithful to him, and that he intended to sell the land upon which he then resided, for the purpose of defeating her of the right of dower in the tract. He applied to an individual to write his will, expressing a desire that his wife should be deprived of dower. He proposed at another time an exchange of lands, and desired that the deed for the land to be exchanged for the tract on Globe creek should be made to his brother, giving as a reason therefor that his wife was unfaithful to him.

NASHVILLE.
December, 1839.

London
v
London,

The place was neglected in its cultivation, the fences got out of repair, and the premises were in rather a dilapidated condition. There was a hewed log building upon it, a barn and some out-houses, but no spring. Much testimony was given as to the value of the place, the lowest estimating its value at one thousand dollars, upon the usual credits of the country, and the highest at two thousand. Several witnesses testified that London, deceased, had offered it at about the sum of twelve hundred dollars. It was ultimately sold to John London, jr., a son by a former wife, for the sum of twelve hundred and seventy-five dollars; of this sum seventy-five dollars was paid at the time of the sale; twelve notes for one hundred dollars each were executed by John London, jr., to John London, sr., payable in twelve successive years. The annual value of the place appears from the testimony to be about one hundred dollars. One of the subscribing witnesses testified that at the time of the sale John London, sr. stated that his object in making the sale was to defeat his wife of her dower in the land. A deed was executed to John London, jr., bearing date the 24th day of February, 1830. At the time of the sale John London, sr., had no land except the premises of which dower is now sought, and complainant moved to the house of a neighbor, in a destitute condition, with six children; the seventh was born after this removal. John London took possession of the premises, and in

NASHVILLE,
December, 1839.

London

"

London.

some short time discharged five of the first notes by the execution of a deed to his father for ninety acres of land of inferior quality in the same neighborhood. John London, sr., took possession of the premises; but complainant, who had separated herself from her husband at the time of the sale of the Globe creek tract, refused to accompany him to it. John London, sr., lived upon the place so purchased for some time, abandoned it, and died in the year 1832. From the time John London, jr. took possession of the Globe creek tract till the filing the bill for dower by the complainant he had made valuable improvements upon it. He improved the dwelling house by the erection of two piazzas and a stone chimney; he repaired the fences, cleared and fenced some ten or fifteen acres of land, and erected a grist-mill.

There is much conflict in the testimony in regard to the charge in the answer of adultery. Numerous witnesses testified that she was a frugal, industrious, chaste and exemplary wife; while some three or four witnesses swore that they had personal knowledge of her infidelity to her husband, as charged in the answer of defendant.

On the 22d day of March, 1839, this cause came on to be heard before chancellor Bramlett, on the bill, answer, replication and proof. The following order was then made:

"And because it appears that the defendant denies that complainant is entitled to dower in the lands in controversy, it is ordered by the court that complainant file her declaration, and the defendant his pleas, and that a jury come to try the issue whether complainant is entitled to dower in said land, and what damages she hath sustained by reason of the detention of the same and the defendant's refusal to assign dower in said land."

Complainant filed her declaration in the following words:

"Pamelia London, widow of John London, sr., deceased, complains of said John London, junior, of a plea of dower, wherein said Pamelia demands of said John, jr., her just and reasonable third part of the said tract or parcel of land mentioned in the said bill and answer, whereof she is by law dowable, of the endowment of John London, deceased, her late husband, according to the true intendment of law, and

whereof she has nothing. And the said complainant avers NASHVILLE,
December, 1839.
that the said John London, senior, deceased, her late husband, London
v
London.
was seized in his demesne as of fee of said tract of land, during her coverture and while she was his wife, and was actually in possession thereof, and that said John, sr., her husband, conveyed the same to said defendant of fraud and covin, to defeat complainant's right of dower in said land, and that the yearly value of said land was, and ever has been since the decease of her said husband, two hundred dollars.

"And the complainant at, &c., on the — day, &c. did demand and request said defendant, who then did and now does claim a right and inheritance in the said land, to assign and set out to her, the said complainant, her dower or just third part of the same; and the said complainant says that the said defendant refused and still refuses to assign and set out to her her dower in the land aforesaid, and that he now refuses so to do, to the damage of complainant ten thousand dollars.

"And the defendant comes and defends, &c., and by order of the court, for plea says, that he is not guilty as the complainant hath alleged, and of this he puts himself upon the country, &c. with leave to give in evidence any special matter which would constitute a bar to the right of dower of complainant."

The bill, answer and proof were exhibited to a jury empannelled and sworn instanter. The court charged the jury as follows:

"The issue submitted to you is as to the validity of the deed from the deceased, John London, sr., to his son, John London, jr. It is alleged by the plaintiff that the deed to the defendant was made with an intent to defraud the plaintiff of her right to dower in the land set forth in said deed. This allegation has been directly denied by the plea of the defendant. He has been permitted to give in evidence any matter which in law would constitute a bar to her right of dower. You will look to the proof in this cause, and ascertain from such proof whether the deed mentioned in such pleadings was made with an intent to defraud the plaintiff by depriving her of her legal right to dower: it must be

NASHVILLE,
December, 1839.

London
v
London.

shown that both parties to the fraudulent conveyance were knowing to and co-operating in it. For instance, if John London, sr., secretly intended to convey his land with the intent to defeat his wife of dower, and that intention was wholly unknown to his son, the bargainee, that would not make the deed fraudulent, and would not authorize either a court of law or of equity to set aside the deed, as his conscience could in no sense be affected by the secret intentions of the father unknown to the son. The fact of knowledge, however, may be established like any other fact, by direct and positive proof, or by the proof of such circumstances as are sufficient to enable the jury to infer such knowledge. You are not presumptuously and without proof to presume fraud; but you will look to all the proof introduced, and then decide from the facts proved by the testimony of credible witnesses, and from circumstances legitimate in their character, established to your satisfaction by the like proof, whether such conveyance was made to defraud the complainant, and render your verdict accordingly.

"The defendant has raised two other questions under the pleadings and proof in the cause. 1st. That the statute of limitations forms a bar to complainant's claim: 2d. That by virtue of our laws the plaintiff has forfeited her right to dower by having committed adultery and eloped with her adulterer.

"The court is of opinion that the statute of limitations does not constitute a bar to the plaintiff's right of dower.

"As to the last point, the court is further of opinion that the defendant did not forfeit her right of dower unless she is proved to have been guilty of adultery and elopement, and it would not do to prove that she was guilty of adultery alone, but adultery and elopement with her adulterer. If the jury should be of opinion, from a careful examination of the proof, that complainant has not been guilty of adultery, they can say so in their verdict. If the jury should be of opinion that the proof establishes the adultery, they must go further and ascertain whether there was both adultery and elopement with her adulterer; and if they should be of opin-

ion that the plaintiff has been guilty of both, then she would, in the opinion of the court, be barred of her dower.

NASHVILLE,
December, 1839.

"This court has no right to direct an issue to be made and tried which is not found in the pleadings.

London
v
London.

"If you should be of opinion that the complainant is entitled to be endowed of the land mentioned in the pleadings, you are at liberty to ascertain the damages she has sustained in consequence of the detention of her dower; then damages may be determined by the value of the rents and the interest thereupon; but the verdict should be rendered in damages, for it is the injury which the plaintiff is supposed by the law to have sustained for the failure of the heir or those holding under him to assign dower as he should have done."

The jury returned a verdict in favor of complainant, and assessed her damages by reason of the detention of her dower, to the sum of seven hundred and twelve dollars and forty-one and a half cents.

A motion was then made by defendant to set aside this verdict, which was overruled by the court, "because it appeared, as well from the proof in the cause as by the verdict of the jury, that the said John London, sr., did convey said tract of land to John London, jr., to defeat the said complainant, his wife's, right of dower, and that said complainant had not been guilty of adultery and elopement, and that she is entitled to dower in said land, and that the defendant had, contrary to law and right, deforced and deprived her of her right to dower from the fall of 1832 till that time;" and the court being further of opinion that the statute of limitations was no bar to her right of dower, ordered, adjudged and decreed that a writ of dower should issue to the sheriff of Marshall county, commanding him to summon five freeholders, in pursuance of the statute of the State, to allot and set off by mites and bounds one third part of said tract of one hundred and fifty acres of land, including "the dwelling house, all offices, out-houses, buildings and improvements thereunto belonging or in anywise appertaining;" and said sheriff should put said complainant in possession of the same, to hold during her natural life; and the court further decreed that complainant should recover of the defendant the sum of seven

NASHVILLE,
December, 1839.

London
v
London.

hundred and twelve dollars and forty-one and a half cents damages by the jury assessed, and the costs of the suit.

From this decree the defendant appealed.

Cook for appellant. 1st. The verdict of the jury and decree of the court as to the validity of the deed is not sustained by the proof, and is erroneous. Defendant gave a full and adequate consideration for the land, and whatever might have been the objects of John London, senior, it is distinctly denied in the answer of the appellant that he knew any thing of the existence of a fraudulent intent on the part of his father in making the sale, and there is not the slightest proof to sustain such a charge. The deed was a valid *bona fide* conveyance of the land to the appellant. The verdict of the jury is not conclusive upon the court, but is only of weight so far as it goes to settle a point of evidence equally balanced:

2d. The decree is clearly erroneous in giving the complainant one-third of the land in value in its improved state at the time of the decree. By the clearly established principles of law the wife was only entitled to one-third of the land in value exclusive of the improvements made after a sale. *Thompson vs Morrow*, 5 Serg. and Rawle, 389: *Humphreys vs. Phinny*, 1 Johnson's Rep. 494: 6 Johnson's Ch. Rep. 258-9: *Callin vs. Moore*, 9 Mass. 218: *Powell vs. M. & B. Manufacturing Company*, 3 Mason, 347: *Dorchester vs. Coventry*, 11 John. Rep. 510: 1 Roper on Property, 346, 347.

The decree is manifestly erroneous from the above authorities in giving damages according to the improved value of the land arising from the money and labor put upon the premises by the appellant after his purchase. In case of alienation she is entitled to rents or damages from the time of demand of dower, and those only according to the state and condition of the premises at the time of the alienation. In this case the almost entire proceeds of the place arose from the labor and money appellant bestowed upon it. He repaired the entire fencing, cleared and fenced some ten or fifteen acres of land, improved the dwelling house, and erected a valuable mill. It cannot be possible that she would be entitled to dower of those valuable improvements or damages

for the detention of improvements which did not exist at the time her husband was seized or possessed of them, or at his death.

NASHVILLE,
December, 1839.

London
v
London.

Cahal, for the complainant. Mr. Cahal furnished no brief of which the reporter could avail himself.

REESE, J. delivered the opinion of the court.

This is a bill filed by the complainant to have dower assigned her in a tract of land conveyed by the husband in his life time to the defendant, his son, with the purpose and intent, as the complainant alleges, to deprive her of her dower therein, and for an account; and whether said conveyance was fraudulent and void as against the widow's claim for dower by the provisions of the act 1784, ch. 22, sec. 8, was, aside from the account of profits prayed, the only subject of controversy, for the allegation in the answer of infidelity of the wife is uncoupled with a statement of elopement. The defendant insisted upon the validity of the deed, and resisted the assignment of dower and the claim for account. And the whole question, both as respects the validity of the conveyance and the amount of profits if the conveyance as against the complainant should be set aside, were proper for the consideration of a court of equity, and the chancellor might well have decided upon the whole matter. But the chancellor saw proper to call before him and empanel a jury to whom was submitted the whole question, as well touching the matter of account as the validity of the deed. The jury in their verdict find the deed to be fraudulent as against the complainant, and they assess her damages for the detention of her dower to seven hundred and twelve dollars and forty-one and a fourth cents; this finding formed the basis of the chancellor's decree. We are satisfied with the decree of the chancellor as to the invalidity of the deed, but as to the matter of account we are not satisfied with the mode in which it was taken, not being according to the course of a court of chancery, nor are we satisfied with the result in point of amount. The proof in the case makes the annual rent of the entire tract to have been at most one hundred dollars,

NASHVILLE,
December, 1839.

London
v
London.

and the time of the rendition of the verdict and the pronouncing of the decree from the death of the husband was about six years and six months. The damages given in England at the time when in that country the writ of *unde nihil habet* was in general use, was, by the express purview and terms of the statute 20 Henry III, called the statute of Merton, the one-third of the annual profits of the estate from the death of the husband. But it has been insisted that this verdict is conclusive; that it is not to be regarded as auxiliary to the chancellor in pronouncing his decree, but that the proceeding was necessary in order to have pronounced any decree at all upon the subject of the account prayed for in the bill; and it is even urged that a court of chancery has no jurisdiction to give relief in a matter of account in dower, when the right to dower is disputed and is sent to be tried at law; such trial at law of the right it is said ousts the court of its power over the relief as to the matter of account, and turns the question into one of damages, to be passed upon, if at all, by the jury which determines the right. This objection, even as regards the proceeding in England, is utterly groundless. The case of *Curtis vs. Curtis*, a leading case and very peculiar in its circumstances, (2 Brown's cases in chancery, 620,) covers the whole ground of the objection, and decidedly negatives its correctness. A bill was filed to have dower assigned, and for an account. The heir in his answer denied the marriage. The bill was retained and leave given complainant to investigate her right at law. She sued out her writ of dower, and the heir pleaded, but before issue joined died, leaving a widow, who was devisee for life; a bill of revivor was filed against her, and a declaration in the case was delivered to her, and she pleaded: 1st. That the plaintiff had not been married to the elder Curtis. 2d. That he had not been seized during coverture. The court of common pleas sent the first issue to the Bishop of Bath and Wells, who certified the marriage, and the issue upon the seizin was found in favor of the plaintiff; and then the widow of the heir died, and afterwards the complainant, the widow of the elder Curtis, died, and her personal representatives filed a bill of revivor and supplement against the rep-

representative and devisee in remainder of the first heir, to have an assignment of dower upon the right to dower so ascertained, and an account of profits up to the time of the death of the complainant in the original bill, against the several estates represented by the defendants. And the dower was assigned, and the account given accordingly; and Lord Alvanly distinctly admitted that the remedy was gone at law. He says, indeed, "that it seems to him an odd construction of the statute of Merton, that the damages given by it are to be considered strictly as damages in the breast of a jury, and not capable of ascertainment by the court, and that therefore they are to die with the person; however, so it has been determined." Again, in the same case, he says, "If in this court you deny the widow's right to dower, the question must be tried at law; but where the fact is ascertained, she shall have her relief here." And referring to the case of *Dormer vs. Fortescue*, determined by Lord Hardwicke, and reported by Mr. Atkyns, Lord Alvanly says, "as far as one can collect Lord Hardwicke's sentiments from the case, he thought this court would expect the widow to establish her title at law, but she having done so would give her relief here as to the mesne profits." That is saying let the widow bring her action at law out of term, and for the purpose of determining her title to dower, and when she has done that we will give adequate relief; and I agree in thinking that the widow labors under so many disadvantages at law, that she is fully entitled to every assistance that this court can give her, not only in paving the way for her to establish her right at law, but also by giving complete relief where the right is ascertained." In the subsequent case of *Mundy vs. Mundy*, Lord Loughborough, speaking on the question of jurisdiction, says; "That it is not controverted that dower is very similar to the right of tenant in common. This court has entertained bills for partition, and the jurisdiction has been admitted in bills for dower for a long time under some circumstances. The principle of that is just, for where parties have a common interest they have it ascertained. That necessarily involves a species of account. If that is answered by the proceedings here, there is no occasion to send it to

NASHVILLE,
December, 1839.

London
v
London.

NASHVILLE,
December, 1839.

London
v
London.

law, where there is a degree of intricacy and difficulty. This has had the effect of almost putting an end to writs of dower. In the course of twelve years I do not remember more than two, and they must be in the court of common pleas. But this jurisdiction is peculiarly proper on another ground. Dower at law can only be opposed by a legal bar. Now, equitable bars are in daily practice." 2 Ves. jr., 1793, and 4 B. C. C. 295: see also *Goodenough vs. Goodenough*, Dickens, 795. The learned commentator on American Law, vol. 4, p. 71, 3d edition, says, "Dower may be recovered by bill in equity as well as action at law. The jurisdiction of chancery over the claim of dower has been thoroughly examined, clearly asserted, and definitely established. It is a jurisdiction concurrent with that at law, and when the legal title to dower is in controversy it must be settled at law; but if that be admitted or settled, free and effectual relief can be granted to the widow in equity, both as to the assignment of dower and the damages. The equity jurisdiction was so well established, and in such exercise in England, that Lord Loughborough said that writs of dower had almost gone out of practice. The equity jurisdiction has been equally entertained in this country, though the writ of dower *unde nihil habet* is the remedy by suit in practice." The preceding review of authorities will, I fear, be thought a labor of supererogation, when it is remembered that in this State we have no writ of dower, *unde nihil habet*, or other writ of right, nor any remedy on the subject of dower, except the summary one given by the statute of 1784, ch. 2, not adapted to taking the account or ascertaining damages, and the remedy by bill in equity; and when also it is remembered that the act of 1823, ch. 37, gives to widows dower out of the equitable estates in land of which their husbands were owners at the time of their death; and lastly and especially, when it is remembered that the act of 1835, ch. 19, sec. 4, expressly provides "that the circuit courts shall have original and concurrent jurisdiction with the chancery courts of all petitions relative to dower." It is obvious that it was unnecessary, perhaps improper, to have submitted the matter of account to the jury; at all events, their finding does not exclude the court

from calculating and ascertaining for itself the true amount of compensation to be decreed to the widow for the detention of her dower. No doubt is entertained by us that in cases of dower in chancery, where the marriage or the seizure is denied, or where adultery and elopement are imputed, or where the tenant in possession does not claim under the husband or the heir but adversely, that in some of these cases an issue should be submitted to a jury, in others an action should be directed to be brought at law. Such a step would be in accordance with the course of a court of chancery; but the facts being found, or the right established in these cases in favor of the complainant, the court should give complete relief by assigning the dower, and taking all proper accounts between the parties. The proceeding in the chancery court, and the conclusiveness of the verdict in this case rendered, are sought to be maintained by some general observations in the case of *Thompson vs. Stacy*, on the subject of dower at common law, and the damages given by the statute of Merton, and in reference to the remedy furnished by our act of 1784. The point before the court in that case is stated in the note of the reporter: "A dowress cannot maintain an action of assumpsit for use and occupation against a tenant from year to year for rents which accrue after the death of the husband and before the assignment of her dower, although no damages were given to her when her dower was assigned." This was the only point in the case, and of the correctness of the decision upon that point the court now, as then, entertain no doubt. But in the observations made by the writer of the opinion upon the widow's rights and remedies at common law, the reporter, from his notes of the case, seems to have supposed the three following propositions to have been involved: "1st. That under the statute of 1784, authorizing the widow to file her petition in the county court or circuit court, if the right to dower is disputed, a jury must be empannelled to try it, and the damages are to be assessed by the jury. 2d. If, upon a petition filed under said statute, the widow's right to dower is not disputed, and she claims damages which are not admitted, a writ of enquiry must be awarded to ascertain them. And 3d. If

NASHVILLE.
December, 1839.

London
v
London.

NASHVILLE,
December, 1839.

London
v
London.

the widow's dower be assigned under the provisions of that act, and no damages be assessed or given to her in the proceeding, her right to recover damages is forever gone." If the reporter be correct in supposing that the general observations referred to contain the conclusions in the three propositions stated above, then the reasoning in the present case establishes, that we doubt the correctness of some of them, and are not at present prepared to yield an authoritative sanction to any one of them.

Upon the whole we are satisfied that one-third of the amount of the verdict in this case rendered will be a proper sum to allow for the rents and profits; or rather, perhaps, thirty-three and one-third dollars for each year, and interest thereon, which the clerk and master will ascertain and calculate, and thereon make his report.

INTERLOCUTORY DECREE.

This cause came on for hearing this 28th January, 1840, before the supreme court, whereupon it appearing to the court that the verdict of the jury assessing complainant's damage for the detention of her dower is excessive and not warranted by the evidence in the cause, it is ordered, adjudged and decreed by the court that the decree of the court below be reversed, and that the clerk and master of this court take and state an account of said damages, being one-third of the annual value of said land from the death of John London to this time, with interest, estimating the yearly value of the whole tract of land at one hundred dollars per year, and allowing the complainant one-third thereof, and until the coming in of said report other matters are reserved.

At a subsequent day of the term the clerk and master, in pursuance of the interlocutory order, reported the sum of two hundred and seventy-five dollars and twenty-five cents in favor of the complainant, whereupon the following final decree was rendered in the cause.

FINAL DECREE.

This cause came on again for final hearing, upon the report of the clerk and master, made in pursuance of the interlocutory order heretofore made, and the said report is in all things affirmed; and it appearing to the satisfaction of the

NASHVILLE,
December, 1839.London
v
London.

court that the conveyance of the land in the pleadings mentioned, from John London, senior, to the defendant, was made with the fraudulent intent of defeating the complainant of her right of dower in said land, it is therefore ordered, adjudged and decreed that said conveyance, so far as regards the rights of the complainant, be and is hereby declared void, and that a writ issue to the sheriff of Marshall county commanding him to summon five freeholders of said county, who shall allot and set apart to said Pamela London the one-third part in value of said land, including the mansion house, if the said Pamela shall so elect, but in laying off said dower they shall have regard to the improvements put on the said land by the defendant since the death of John London, senior, which are not to be taken into consideration in estimating the value of said land, but the same shall be estimated in value according to its state and condition at the death of John London, senior. And in case the complainant shall elect to take her dower including the mansion house, or the same shall be allotted to her, then the value of the improvements put upon said part since the death of John London, senior, so allotted in dower to complainant as in its improved state, shall be one-third of the whole value of the land in the fall of 1832 at the death of John London, senior. And it is further ordered, adjudged and decreed that in laying off said dower proper regard shall be had to the whole tract and to the adjoining lands of defendant so as to do as little injury as possible to the same in doing justice to the complainant. And it is further ordered, adjudged and decreed that the complainant recover of the defendant the sum of two hundred and seventy-five dollars and twenty-five cents for her damages, as reported by the clerk and master, and that the defendant pay all the costs of the court below; and that half of the costs of this court be paid by the defendant and the other half by the complainant.

NASHVILLE,
December, 1839.

Turner

v

Ross.

TURNER vs. ROSS.

The act of 1801, ch. 6, sec. 59, was not intended to prevent the court from granting new trials for error in the charge of the court to the jury, for error in the admission or rejection of testimony, or for the misconduct of the jury, and the like.

If a party has obtained two new trials, and seeks to set aside the third verdict obtained against him, the record must show that one or both of the previous verdicts have been set aside from error in the charge of the court, or in the admission or rejection of testimony, or for the misconduct of the jury, or the like.

On the 8th day of December, 1828, Turner instituted an action of ejectment in the circuit court of Franklin county, against Wiley J. Hines, the tenant in possession, for the recovery of the possession of one hundred and fifty acres of land lying in the second district in Franklin county. The cause was continued till the January term, 1829, at which time Frederick A. Ross, by leave of the court, was made defendant and pleaded not guilty. Issue was joined, and the cause was continued until the January term, 1832, at which time it was tried, and a verdict rendered in favor of Turner. A motion was made at the same term to set aside the verdict rendered, which was done, and a new trial awarded to the defendant Ross. The record is silent as to the grounds upon which this verdict was set aside. The cause was continued until the July term, 1832. It was then tried again, and a verdict returned for the lessee of Turner. A motion was made to set aside this verdict, and overruled. An appeal in the nature of a writ of error was taken to the supreme court at Sparta, held on the 1st Monday in August, 1832. The judgment was reversed, and the cause remanded to the circuit court for further proceedings. The decision of the supreme court at Sparta is reported in 5th Yerger's Reports, 338.

It was continued in the circuit court until the July term, 1836. It was then tried, and a verdict returned that "the defendant is guilty of the trespass and ejectment, as the plaintiff against him hath complained, for all the land lying north of Ross' northern boundary when run from the north- .

west corner according to the needle." On the 30th July, during the same term, this verdict was set aside, and a new trial awarded on the motion of the defendant. The record does not show the grounds upon which the court acted in setting aside this verdict. The cause was then continued from time to time, by reason of the incompetency of the court and other causes, until the May term, 1839, at which term the cause was again tried, and the jury returned a verdict against the defendant, and declared that the "plaintiff has the better title to all the land in controversy which lies north of the line on the plat made out by George Gray, which they make a part of their verdict, running from the north-west corner of Ross' fifteen hundred and fifty acre survey due east by the needle."

NASHVILLE,
December, 1839.

Turner
v
Ross.

On motion of the defendant, this verdict was set aside and a new trial awarded; to which the plaintiff objected, and his objection being overruled, he tendered his bill of exceptions, which was signed, sealed and made a part of the record, in the following words:

"Be it remembered, that on Saturday, the 6th day of the term, the defendant, by his attorney, moved the court to set aside the verdict and judgment in this case and grant him a new trial, on the ground that said verdict was contrary to law, to the evidence and to the justice of the case; to which the plaintiff objected, because two new trials had been heretofore granted by the court to the said defendant. To obviate the effect of which, the defendant produced and read to the court the following affidavit of H. L. Turney, Esq. to wit:

"*Turner vs. Ross.* In this cause Hopkins L. Turney makes oath that at the January term of the circuit court of Franklin county, 1832, this cause was tried and resulted in a verdict and judgment for the plaintiff; that the cause was, by the instruction of the court to the jury, made to turn on the mode or manner of surveying the northern boundary line of Ross' fifteen hundred and fifty acre grant, that is, whether the line should be run to the needle or to the true meridian. The court instructed the jury that the line should run to the needle, and the jury found accordingly. On the motion for the new trial, the same question was before the

NASHVILLE,
December, 1839.

Turner
v
Ross.

court, that is, whether the northern boundary of Ross' fifteen hundred and fifty acre tract should be run to the needle or to the true meridian. The court granted the new trial because the court was not satisfied with the correctness of his instructions to the jury and their finding in accordance therewith, and ordered a survey to be made and a plat to be returned to the then next term, and appointed J. W. Holder to make the same; that the question of estoppel or of re-marking was not made nor decided by the court at this trial of the cause. Affiant, as one of the defendant's counsel, attended to the cause at the trial alluded to in this affidavit."

The court overruled the objections of the plaintiff, and ordered the verdict and judgment to be set aside and a new trial to be awarded; to which opinion of the court the plaintiff, by his counsel, excepts, and prays that this, his bill of exceptions, may be signed, sealed and enrolled, which is done accordingly.

EDMUND DILLAHUNTY, [Seal.]"

The cause was continued until the September term, 1839. It was then tried, and the jury returned a verdict of not guilty, and a judgment was rendered in accordance therewith. An appeal in the nature of a writ of error was obtained to the supreme court.

The following entry appears of record, as made at the September term, 1839:

"It is agreed between the parties that if the supreme court shall be of the opinion that the judgment of this court at the last term, awarding a new trial, was erroneous, then final judgment shall be entered for the plaintiffs; but if the opinion of the supreme court should be in favor of the defendant on that point, and the judgment should be affirmed, then this judgment shall be set aside and for nothing held, and the cause remanded for a new trial to be had thereupon, without prejudice to either party."

Campbell, for plaintiff in error.

Taul, for defendant in error.

REESE, J. delivered the opinion of the court.

NASHVILLE,
December, 1839.

Turner
v
Ross.

This cause was tried at May term, 1839, of the circuit court for Franklin county, and a verdict was rendered for the lessor of the plaintiff, being the fourth verdict which he had obtained. On a motion being made by the defendant to set aside the verdict and grant him a new trial, an affidavit was made by defendant's counsel to show that the judge who presided at the time the first new trial was given, in 1832, set aside the verdict because he was not satisfied with the legal correctness of the charge which he had given to the jury; upon which the court granted a new trial. At the succeeding term a verdict was rendered against the lessor of the plaintiff and a judgment thereon; to reverse which, and to have a judgment rendered in his favor upon the verdict of May, 1839, he prosecuted this writ of error.

Upon the grounds or reasons which induced the court to grant two of the new trials previous to that of May, 1839 the record is wholly silent. The act of 1801, ch. 6, sec. 59, provides "that not more than two new trials shall be granted to the same party." The construction given to the act by this court in the case of *Trott vs. West, Moss & Co.* 10 Yerg. Reports, 500, is, "that it means that where the facts of the case have been fairly left to the jury upon a correct charge of the court, and they have twice found a verdict for the same party, each of which has been set aside by the court, if the same party obtain another verdict, in like manner, it shall not be disturbed. But the act did not intend to prevent the court from granting new trials for error in the charge of the court to the jury, for error in the admission or rejection of testimony, for the misconduct of the jury, and the like."

In the case before us, in reference to two of the trials the record is silent as to the grounds of action of the court in setting aside the verdicts. We think that in order to give any operation whatever to the act of assembly, this court must certainly hold that he who insists that the two new trials (which are supposed to constitute an obstacle to the granting of a third new trial) were in fact granted upon any

NASHVILLE,
December, 1839.

Turner
v
Ross.

of the legal grounds set forth in the case of *Trott vs. West, Moss & Co.* or grounds similar, must make it so to appear; and the only question, therefore, is, whether these grounds shall be made to appear by the record, or may be shown *aliunde*. We are satisfied that the grounds of action of the court should be set forth by the court itself in the record made at the time of granting the new trial. Any evidence other than that or less than that would certainly be wrong in practice. As to the legal grounds moving the conscience and prompting the action of the court, the court itself, through its records, must speak. But it is said that it is not usual to state upon the record the grounds on which a new trial has been granted. It would be very easy to do so; and if it shall often happen that the juries of the country, contrary to a most grave and solemn duty, shall turn a deaf ear to the law of the case, as expounded by the court in its charge, and the legislature shall choose to continue the limitation upon the legal discretion of the judge, contained in the act of 1801, it may become very proper for him to adopt a mode of entry upon the record in cases of new trials, which, showing always the ground of his action, shall place the responsibility, if the law must be defeated and injustice be done, where it ought properly to rest.

— We are of opinion, therefore, that the last verdict and judgment must be set aside, and also the judgment of the court at May term, 1839, granting a new trial, and that judgment be pronounced upon the verdict given at said May term, 1839, for the lessor of the plaintiff.

PHIPPS vs. RICHMOND.

NASHVILLE,
December, 1839.Phipps
v
Richmond.

The statute of limitations of three years is not a bar to an action before a justice of the peace founded upon a simple contract, upon which an action of debt might be maintained if of sufficient amount to force the parties into a court of record.

On the 12th day of February, 1836, Daniel and Andrew Richmond procured a warrant against William R. D. Phipps in the followings words:

"State of Tennessee, Wilson county. To any lawful officer to execute and return. Summon William D. Phipps to appear before me or some other justice of the peace for Wilson county, to answer the complaint of Daniel and Andrew Richmond in a plea of debt due by account. Given under my hand and seal this 12th day of February, 1836.

JAMES SOMERS, J. P."

On the 15th day of March, 1836, Silas Tarver, a justice of the peace of Wilson county, rendered judgment in favor of the plaintiffs and against the defendant for the sum of forty-three dollars and ninety-three cents, which was the amount of a charge for medicines and medical services, after the deduction of certain credits. From this judgment an appeal was taken to the circuit court of Wilson by the defendant. During the pendency of the suit in the circuit court Andrew Richmond died, and the suit was then prosecuted in the name of the surviving partner, when, at the February term, 1839, the cause was submitted to a jury, the honorable S. Anderson presiding. The defendant relied upon the plea that the account was barred by the statute of 1715, ch. 27, sec. 5, passed for the limitation of certain actions therein specified to three years next after the cause of action shall have accrued. The court charged the jury "that the statute of limitations of three years would operate as a bar to an account sued upon before a magistrate, although the warrant was issued in debt, and that the limitation of six years did not apply, as insisted upon by the plaintiff's attorney." Upon the charge the jury rendered a verdict for the defendant; a motion was made for a new trial by the plaintiff and overruled.

NASHVILLE, and judgment rendered, and an appeal in the nature of a writ of error taken to the supreme court.

Phipps
v
Richmond.

R. L. Caruthers, for the plaintiff in error, relied upon *Tisdale vs. Monroe*, 3 Yerger, 320: *Burdoine vs. Shelton*, 10 Yerger, 41: *Donaho vs. Kirkman*, 6 Pet. 20.

R. M. Burton, cited statute 1715, ch. 27, sec. 5: *Pike vs. Green*, 1 Yerger, 465.

TURLEY, J. delivered the opinion of the court.

The only question in this case is, whether the statute of limitations of three years is a bar to an action before a justice of the peace founded upon a simple contract, upon which an action of debt might be maintained if of sufficient amount to force the parties into a court of record. It is contended for the defendant in error, upon the authority of the case of *Pike vs. Green*, 1 Yerg. Rep. 465, that it is. This case is in point if it were law, but we think it is not. It was made before the question as to whether the statute of 21 James I, was in force in the country was determined, and therefore was not considered of in relation thereto. But afterwards, in the case of *Tisdale vs. Munroe*, 3 Yerger, 320, this question was investigated and the statute held to be in force. This decision we think has materially varied the subject. Before the decision it was doubtful if the statute were in force; if it were not, then there was no statute of limitations to actions upon simple contracts except for arrearages of rent, and, of consequence, courts would lean in favor of a construction by which our statute of 1715, which bars action of account and upon the case in three years, could be brought to bear upon such contracts; hence, in the case referred to, *Pike vs. Green*, it was held, that inasmuch as before justices of the peace there is no specific form of action, and that case will lie as well as debt, that the statute shall be held to apply. But since the decision of *Tisdale vs. Munroe* this difficulty is removed. There is now a statute of limitations which operates upon simple contracts; if the time be too long the legislature must shorten it.

- That the decision of the case of *Pike vs. Green* is erroneous may be made obvious from the reasoning of the court. It says, "in this summary proceeding the substance is looked to, as in courts of chancery, and the statute made to apply to the evidence." Now this proposition is true, but the deduction from it is false. It has always been held that a court of chancery applies the statute of limitations upon the same principles as courts of law; if the party be barred at law he is barred in chancery, and *vice versa*. A court of chancery having no form of action, must, of necessity, look to the evidence, and if upon that evidence an action could be brought at law which is not barred by the statute of limitations the party is not barred in chancery. See *Burdoine vs. Shelton*, 10 Yerger, 41. There is no reason for applying a different principle to trials before justices of the peace; indeed the court in that case do not attempt it, but admit that the same rule is applicable to both tribunals.

NASHVILLE,
December, 1839.

Crosthwait
v
Ross.

The judgment of the circuit court will therefore be reversed, and the cause remanded for a new trial.

CROSTHWAIT vs. ROSS.

Partners in trade, or partners in occupation or employment, can bind their co-partners in a matter which according to the usual course of dealing has reference to business transacted by the firm; but on the contrary, if a person deals with a partner in a matter not within the scope of the partnership, the intention of the law will be that he deals with him on his private account, notwithstanding the partnership name may be used.

A partner in the practice of physic has the power to bind his co-partner by the execution of a note in the name of the firm for the purchase of all things necessary to be used by them in their vocation, such as medicines, surgical instruments, and the like, but has no power to draw bills or make notes for the purpose of raising money, money not being an article for which such a firm has a direct use.

The facts of this case as exhibited by the record are, so far as they are necessary to be stated to present the point determined by the court, substantially as follows. Alfred Hartwell and George D. Crosthwait, two practising physi-

NASHVILLE,
December, 1839.

Crosthwait
v
Ross.

cians in the county of Rutherford, entered into articles of partnership, which were as follows, to wit:

"Articles of agreement for a partnership to commence on the 14th day of January, 1834, between Alfred Hartwell and George D. Crosthwait, of Murfreesboro', Tennessee:

"Article 1. The partnership to continue under the firm of Hartwell and Crosthwait for two years from and after the 14th day of January, 1834, unless either one of the parties should determine to relinquish the practice or move to some other place; in that event the party so determining shall be at liberty to do so at the expiration of one year, and not sooner.

"Article 2. The partnership shall be in every respect equal; all debts, either by account or otherwise, from our joint services, shall at the expiration of the term be equally divided; the expenses of the firm shall be equal.

"Article 3. Each party shall at all times use all honorable means to promote the interest of the firm, and their labors to be as nearly equal as possible. In testimony whereof we affix our hands and seals the day and date above.

ALFRED HARTWELL, [Seal.]

GEO. D. CROSTHWAIT, [Seal.]"

Under these articles they rented a shop in the town of Murfreesboro', for which they executed a note in the name of the firm of Hartwell & Crosthwait; they contracted a store account in the name of the firm; they subscribed their firm name to articles for the establishment of a race track; they owned a blooded horse jointly, but executed in payment therefor a note with their individual names signed by each respectively; they purchased medicines on two several occasions during the existence of their partnership, for which they executed their firm name, each of those purchases amounted to about one hundred dollars in value. The evidence did not justify the belief that the partnership existed in regard to any thing except the practice of physic.

In the month of May, 1835, during the existence of the partnership, Hartwell executed a promissory note in the words following:

"\$350 00. Four months after date we promise to pay to

William W. Ross, or order, three hundred and fifty dollars, NASHVILLE,
at the Planters Bank of Tennessee, value received. Witness December, 1839.
our hands this 14th day of May, 1835.

Crosthwait
v
Ross.

HARTWELL & CROSTHWAIT."

This note was endorsed first by Ross and then by William H. Hanna; it was discounted at the Planters Bank and the proceeds paid over to Hartwell, and by him appropriated to his individual purposes. This note was in the hand-writing of Hartwell, and it does not appear that complainant knew of the existence of the note till after the death of Hartwell, about the period of its maturity; when informed of the fact he appeared surprised, and stated that the use of his name was wholly unauthorized in the transaction. On more than one occasion, during the lifetime of Hartwell, Crosthwait when presented with notes signed by Hartwell and Crosthwait protested against the use of his name as unauthorized. Hartwell was in embarrassed circumstances, and by some of the witnesses said to be "notoriously insolvent." There was no evidence which justified the belief that Ross knew that the note was made for the purpose of raising money to answer the individual purposes of Hartwell, or that it would be appropriated in that way. Two physicians proved that it was unnecessary that the firm of Hartwell & Crosthwait should have expended more than about one hundred dollars annually in the purchase of medicine, and that it was not necessary that partners in the practice of physic should execute notes in the name of the firm, nor was it usual.

When the note fell due it was discharged by Hanna. Ross refunded the money to Hanna, took the note, and instituted an action of debt on the 1st of July, 1836, in the circuit court of Rutherford county against Crosthwait. Crosthwait pleaded that he did not execute the note nor authorize the execution of it. Issue was taken upon this plea, and the cause was continued till June term, 1837, when a trial took place. The jury gave a verdict in favor of the defendant. A motion was made to set aside this verdict, and the motion prevailed and a new trial was granted to the plaintiff. The cause was continued until the February term, 1838, when a jury of Rutherford, the honorable Samuel Anderson pre-

NASHVILLE,
December, 1839.

Crothwait
v
Ross.

siding, returned a verdict in favor of the plaintiff for the amount of the note and damages. This verdict was set aside, upon motion of the defendant, and a new trial ordered. The cause was again continued until the July term, 1839, when it was again tried upon the facts as exhibited above.

The honorable Samuel Anderson charged the jury amongst other things as follows: "The general rule as to the liabilities of partners for the contracts of one member of the firm is that each is liable unless the nature of the transaction is such as to show that the contract was for the benefit of the partner making the contract, unless the person dealing with the partner did in fact know, or might have known by reasonable inquiry, that such contract was for the individual benefit of that member of the firm. In the absence of such actual or circumstantial knowledge, and when the transaction itself does not show it was for the individual benefit of the partner making the contract, the legal presumption is that the contract was entered into for the benefit of the firm, and the partners will be held liable." The court further charged the jury that "if a partnership could exist and be carried on without incurring any expense whatever, in such a partnership one member of the firm could not bind the others by note without showing more than the mere fact of partnership; the jury must determine from the proof whether the firm of Hartwell & Crothwait did in fact incur some expense in accomplishing the object of their partnership, viz: in practising physic together; if so, the contract of partnership conferred authority on each to buy such articles as in his judgment would best advance the interest of the firm." The court further charged the jury that "if some expense was incurred in carrying on the business of the firm, Hartwell had authority to bind his co-partner Crothwait in such contracts for such expenses, and in thus acting he was exercising a general power connected with that business as distinguished from a special power, and the partnership contract conferring a general authority in the business, it follows that Crothwait is bound on the note sued on unless the face of the note showed that it was for the individual benefit of Hartwell, or unless Ross actually knew at the time he endorsed

the note that it was for the benefit of Hartwell, or might have known that fact by reasonable diligence. In deciding the cause upon this view of the subject the jury would determine from the proof whether Hartwell was insolvent at the date of the note, or greatly embarrassed, whether his situation was known to Ross, and if so, whether a prudent, conscientious man with such knowledge would have his suspicions excited as to the fairness of the transaction. The jury would also look to the size of the note, the nature and object of the partnership, the season of the year the note was given, and determine whether the amount of the note at that season of the year was for a larger sum than would be reasonably required for the uses of the firm; if it was, then the face of the note itself should have put Ross on his guard, and he would not be permitted to say that he endorsed the note upon the credit of both partners under a belief that the contract of partnership alone conferred upon Hartwell authority to give the note of the firm to an unlimited amount." The court further charged the jury that "they had a right to determine from the proof whether Hartwell and Crosthwait did in fact purchase their medicines upon a credit and give the note of the firm for payment, or authorize others to give such notes for them; and to enquire also whether they gave the note of the firm for house rent or other expenses; if they did under these circumstances, it would be proper for the jury to say whether such a course of dealing would not of itself authorize them to infer an express assent or agreement that each should trade in procuring necessities for the partnership upon the credit of the firm; if, from this custom of dealing, the jury should infer such express assent, the power conferred on each by such express assent would be in its nature a general authority and make each liable to the extent before stated, although the court should have erred in the opinion advanced that the contract of partnership of itself necessarily conferred such authority." The jury returned a verdict in favor of the plaintiff for the amount of the note, three hundred and fifty dollars, and eighty dollars and fifty cents damages.

NASHVILLE,
December, 1839.

Crosthwait
v
Ross.

A motion was made by the defendant to set aside the ver-

NASHVILLE,
December, 1839.

Crosthwait
v.
Ross.

dict, but the court overruled the motion and gave judgment according with the verdict. An appeal in the nature of a writ of error was obtained by the defendant to the supreme court.

Edwin A. Keeble and James W. Campbell, for the plaintiff in error. They cited 4 Kent, 17, 27, 42, 43: *Livingston vs. Rosewell*, 4 Johns. 251: *Dickinson vs. Valpray*, 21 Eng. Com. Law Rep. 41: *Smith's Mercantile Law*, 24: 14 Wend. 133, 141: *Wilson vs. Williams*, 14 Wend. 146.

Charles Ready, for defendant in error, cited *Walden vs. Sherburne*, 15 Johns. 422: *Bond vs. Gibson and Jephson*, 1 Camp. N. C. Rep. 185: *Swan, and others vs. Steele, and others*, 7 East, 210: *Ridley, et al. vs. Taylor*, 13 East, 175: *Livingston vs. Rosewell*, 4 Johns. 251: *Dubois vs. Rosewell*, 4 Johns. 262: *Lansing vs. Caine and Ten Eyck*, 2 John. 300: *Dickinson vs. Valpray*, 21 Eng. Com. Law Rep. 41: *Collier on Partnership*, 221, 304, 303: *Ballow vs. Spencer*, 4 Cow. Rep. 163: *Vallet vs. Parker*, 6 Wend. 615: *Whitaker vs. Brown*, 14 Wend. 505.

TURLEY, J. delivered the opinion of the court.

This is an action brought by the defendant in error to recover judgment against the plaintiff upon a note for the sum of three hundred and fifty dollars. This note was executed by one Alfred Hartwell, who was a partner in the practice of physic with George D. Crosthwait, the plaintiff in error; it was an accommodation note for his own benefit, and not for the use of the firm. The note was discounted in bank upon the endorsement of Ross, the defendant, and the proceeds applied by Hartwell to his own use. The endorser took up the note at maturity, and has brought this suit to charge Crosthwait as maker, to which he pleaded *non est factum*, which under the charge of the court below was found against him, upon which the writ of error is prosecuted. Several questions are presented for the consideration of the court, only one of which we think necessary to examine, as upon that the responsibility of the plaintiff in error rests, and that

is as to the powers of Hartwell to make his co-partner, Crosthwait, liable upon a promissory note for money received by himself and made for his own accommodation.

NASHVILLE,
December, 1839.

Crosthwait
v
Hess.

This question necessarily involves the power of partners to bind each other, and the extent to which it may be carried. Without entering into the question of what constitutes limited and general partnership, and what is the distinction between them as to the liabilities of the partners, which, as we think, has nothing to do with the case under consideration, we proceed to investigate the subject upon the grounds upon which we think it rests. For this purpose, we think partners may be classed: 1st. Partners in trade. 2d. Partners in occupation or employment. Chancellor Kent, in the third volume of his Commentaries, page 28, says, "It is not essential to a legal partnership that it be confined to a commercial business. It may exist between attorneys, conveyancers, mechanics, artisans or farmers, as well as between merchants or bankers." Now the question is, how far one partner has the right, by his individual contract, to bind his co-partner? We think that when the question is properly understood there is no conflict whatever between the authorities as applicable to partners in trade and partners in occupation or employment. A partner in either case can bind his co-partner in a matter which, according to the usual course of dealing, has reference to business transacted by the firm. See 3 Kent, 41, and the numerous cases there cited in support of this proposition. But, on the contrary, if a person deals with a partner in a matter not within the scope of the partnership, the intendment of the law will be that he deals with him on his private account, notwithstanding the partnership name be used. 3 Kent, 45: 4 John. Reports, 277-8: 16 John. Rep. 38: 19 John. Rep. 154: 6 Wen. 529: 5 Mason, 156. Therefore it is that partners in trade, whose business is buying and selling, or of whose business this constitutes an important item, may make, draw and endorse promissory notes and bills of exchange, and although one of the firm may abuse his trust for his individual benefit, yet the co-partner shall be bound unless the person contracted with knew at the time that it was not done in

NASHVILLE,
December, 1839.

Crosthwait
v
Rose.

good faith; and this, because in such a business the use of such securities is not only considered necessary, but is well sanctioned by commercial usage. But the question recurs, what kind of contract is in the usual course of dealing, and within the scope of the partnership? It is not necessary, nor do we design to argue or determine this question except in relation to the case now under consideration, which is a case of partners in occupation. In the case of *Livingston vs. Rosewell*, 4 John. Rep. 251, it is held that where there are partners engaged in a sugar refinery, if one purchase a lot of brandy and executes a note for the payment thereof in the name of the firm, it is not obligatory upon the firm because not in the usual course of trade of the firm. In the case of *Dickinson vs. Valpray*, 21 Eng. Com. Law Reports, 41, it is held that in the case of an ordinary trading partnership the law implies the power of one partner to bind another by drawing and accepting bills, because the drawing and accepting bills is necessary for the purpose of carrying on a trading partnership, but that it is not generally necessary for a mining company, and that therefore in such a case the law will not imply the power of one of the company to bind the others by such contracts.

Now to apply these principles to the case under consideration. Crosthwait and Hartwell were partners in the practice of physic; this is an occupation, and they may mutually bind each other for all things properly belonging or necessary to be used by them in this vocation, such as medicines, surgical instruments, *et ejusdem generis*; but the drawing of bills or the making of notes is no more within the scope of their partnership, in fact not so much so, as was the buying of the brandy by the partner in the sugar refinery, or the drawing of the bills in the mining company. If the note in this case had been executed for any thing for which a firm of physicians had use, as such the firm would have been bound, though the member who drew it had designed at the time to appropriate it to his own use and did so, unless the person contracted with knew of his intention at the time. But money is not an article for which such a firm has use directly, though it may indirectly, but if it has it must be raised

by the individuals comprising the firm, and not by one member thereof, unless he be authorized by the others so to do independent of any right arising from the partnership.

We therefore think the judgment of the circuit court is erroneous and must be reversed, and the cause remanded for a new trial.

NASHVILLE,
December, 1839.

Berry hill
v
M'Kee.

BERRYHILL's *executors* vs. M'KEE's *executors* and GREENWAY.

Ramsey executed a note to Campbell, payable at the branch bank of the State of Tennessee; Campbell endorsed the note, Berryhill endorsed the note in the style of the firm of Berryhill and M'Kee. The bank took the note in the fair course of trade, without notice of the circumstances under which it was made; a judgment was recovered in a court of law against the maker and Campbell, and against Berryhill, M'Kee and Greenway, who were accommodation endorsers. Berryhill discharged a large portion of the judgment and filed his bill for contribution: Held, that this accommodation endorsement, in a question between the partners, was not binding on M'Kee and Greenway, and that the judgment obtained by the bank furnished no evidence of the liability of M'Kee and Greenway.

An acknowledgment made by Greenway after the dissolution could not affect the rights of M'Kee, nor would the expression of an opinion that he was liable to the holders of the note affect the question between himself and Berryhill.

On the 26th day of November, 1825, William Berryhill filed a bill in the district court of chancery at Franklin against William M'Kee, Edward M. Greenway and Ephraim H. Foster. The defendants acknowledged service of the bill. On the 4th day of September, 1826, Greenway filed his answer, and on the 6th day of December, 1826, M'Kee filed his answer. At the January rules, 1828, the complainant filed a general replication to the answers of M'Kee and Greenway, and Foster having failed to answer, the bill was taken *pro confesso* and set for hearing *ex parte* as to him.

The facts are substantially as follows: Berryhill, a citizen of Nashville, and M'Kee and Greenway, citizens of Abingdon, Virginia, entered into articles of agreement for the purpose of carrying on in partnership the business of merchandizing in the town of Nashville. This association was

NASHVILLE,
December, 1839.

Berryhill
v
M'Kee

formed on the first day of January, 1816, under the firm style of Berryhill and M'Kee. The provisions of this agreement under the seals of parties, so far as it is material here to state them, were, that the partnership should continue "for and during the term of seven years from the above date," and that Berryhill should be the active partner; "that is to say, he will transact all the business of the concern, such as purchasing the goods, attending to the sales thereof, keeping the books, attending to the collection of the debts, and in fact devote the whole of his attention to the business of the concern, and conduct it in the best manner which his abilities and judgment may dictate." Berryhill agreed to furnish a standing capital of five thousand dollars; M'Kee and Greenway agreed to furnish each a standing capital of six thousand and five hundred dollars; and the expenditures were to be charged to the joint account of the firm. M'Kee and Greenway also agreed to furnish five hundred dollars more at the end of six months, and in the event that at that time the capital engaged should be "found insufficient, and it should be convenient for both parties to increase it, they will apportion the increase as five to seven, it being the interest of all parties to make the business profitable and respectable." On the dissolution of the partnership, at the expiration of seven years, "the original capitals were to be refunded, and in the event of a profit, that profit should be divided into two equal parts, one half assigned to Greenway and M'Kee and half to Berryhill, and in the event of loss that loss should be sustained in similar proportions."

Under this article they commenced business in the town of Nashville. Complainant alleges in his bill that in the year 1820, "Thomas Ramsey, a merchant of Nashville, reputed wealthy and respectable, agreed to furnish the firm of Berryhill and M'Kee with twenty thousand bushels of salt, to be sold by them on commission, for which they were to be allowed five per centum on the proceeds of sales. During the time said Ramsey was delivering salt to said Berryhill and M'Kee under said contract, said Ramsey presented a note, drawn by him in favor of William Campbell and by him endorsed and payable at the branch bank of the State of Ten-

nessee at Nashville, for five thousand dollars, and requesting the firm of Berryhill and M'Kee to endorse it, stating that it was a stock note, that his other endorsers were out of town, and that he would not trouble them again to endorse it. Said Ramsey having occasionally endorsed for said Berryhill and M'Kee previously, and believing that they would have a large fund of said Ramsey's in their hands under the salt contract, they endorsed the note." Ramsey failed to comply with his contract for the delivery of the salt, removed to Alabama and died insolvent. Campbell also became insolvent. Green, who also endorsed the note at a renewal, also became insolvent. On the 8th day of October, 1822, the partnership was dissolved by an article of agreement, and the partnership effects placed in the hands of Ephraim H. Foster for the settlement of the debts of the establishment, as the trustee of the parties, and for the purpose of restoring the capital invested and apportioning the profit or loss to each respectively as the profit or loss of the concern should render just. On the 31st day of July, 1823, the State bank recovered a judgment against Campbell, Green, Berryhill, M'Kee and Greenway in the county court of Davidson county for the sum of three thousand and thirty-five dollars and thirty-three cents, the balance of the note above mentioned for five thousand dollars. On the 7th April, 1824, Campbell paid five hundred dollars on the judgment, and Berryhill five hundred. On the 15th January, 1825, Berryhill made a further payment of four hundred and eighty-five dollars and sixty cents. It does not appear that at the dissolution of the partnership on the 8th October, 1822, Berryhill communicated to M'Kee or to Greenway the facts in regard to the liability for Ramsey, but on the 11th day of January, 1823, Greenway, in a letter to Berryhill, used the following language: "I regret extremely to hear by yesterday's mail that we are to sustain so serious a loss by your endorsement for Ramsey, and the whole is likely to fall upon the concern." Foster, not regarding the debt due to the Bank as a debt of the establishment for which the funds in his hands were intended, refused to pay back to Berryhill any portion of the monies

NASHVILLE,
December, 1839.

Berryhill
v
M'Kee.

NASHVILLE,
December, 1839.

Berryhill
v
M'Kee.

he had paid out on the judgment, or to discharge the balance of the judgment, or any portion of it.

Complainant prayed in his bill that Foster, the trustee, should refund to him the sum of one thousand dollars, advanced by complainant, and that he should discharge the balance of the judgment obtained by the bank with the partnership funds.

Greenway and M'Kee, in their separate answers, declare that they had instructed Foster not to pay the judgment obtained by the bank with the partnership funds in his hands; that they knew nothing of the facts and circumstances alleged in the bill as being connected with the endorsement for Ramsey; that they were wholly ignorant of that endorsement for the accommodation of Ramsey at the time it was made; that the said endorsement was made without their consent, and "was an unauthorized and improper use of the name and responsibility of the said firm of Berryhill and M'Kee;" that they did not admit that there was any custom in the town of Nashville for one merchant to endorse for another; that it was not contemplated at the time of the formation of the partnership that the firm of Berryhill and M'Kee should borrow money out of bank for the purpose of carrying on their establishment, much less did they intend to authorize the use of their names as endorsers for the accommodation of others.

On the 28th day of October, 1829, the honorable N. Green, chancellor, gave a decree substantially in conformity with the prayer of the bill, and ordered the clerk and master to report the amount of payments made by Berryhill and the amount of the balance of the debt due by judgment to the bank, &c.

After this decree M'Kee died, and his executors, John H. Fulton and Elias Ogden, were made parties by bill of revivor at the May term, 1835; and at the May term, 1836, the death of Wm. M. Berryhill was suggested, and the bill revived in the name of his executors, James Woods and Charles C. Trabue. On the 16th May, 1836, Berryhill and Green discharged the balance of the judgment, and on the 25th day of April, 1837, upon the coming in of the report of the clerk

and master, the chancellor decreed against Greenway and the executors of M'Kee the one half of three thousand four hundred and eighty-eight dollars and eighty-four cents, to wit: the sum of one thousand seven hundred and forty-four dollars and forty-two cents, the said sum being half of the sum lost by the endorsement; and directed the trustee, Foster, to pay the said sum with the partnership funds, &c. &c.

NASHVILLE,
December, 1839.

Berryhill
v
M'Kee.

From this decree there was an appeal to the supreme court by the defendants.

F. B. Fogg, for plaintiffs in error. One partner cannot bind another by an accommodation endorsement or by a guaranty. The endorsement by Berryhill in the name of Berryhill and M'Kee is binding upon Berryhill alone. The other partners did not authorize it, nor had they any knowledge of it during the existence of the firm. The letter written by Greenway on the 11th January, 1823, was no ratification of an endorsement made in 1820 without his knowledge; and if he was informed that he was legally responsible when he was not, such expression would not bind him in law or equity, and certainly would not bind M'Kee, the other partner. Neither of the parties after the dissolution could, by any agreement or acknowledgment, make that a partnership debt binding upon the common fund which was not so at the time of the dissolution. *Duncan vs. Lowndes*, Campbell's N. P. Cases, 478: 2 Barn. and Al. 673: *Crawford vs. Starking*, 4 Esp. N. P. Reports, 207: 12 Sergeant and Rawle, 13: 16 Johnson, 154: 5 Connecticut Rep. 574; 1 Wend. Rep. 529,

Campbell, for defendants in error. The letter written from New York on the 11th day of January, 1823, by Greenway to Berryhill, shows conclusively that the defendants considered themselves bound and had no idea of questioning the authority of Berryhill to make the endorsement. In July, 1823, the bank of Tennessee instituted an action against the maker of the note and against all of the endorsers, M'Kee and Greenway included. All the members of the firm were properly before the court defending themselves; it was then ascertained and adjudged that the endorsement upon the note

NASHVILLE, was binding upon M'Kee and Greenway. Berryhill's authority to endorse was established by the judgment at law.
December, 1839.

Berryhill

▼
M'Kee.

CULLOM, J. delivered the opinion of the court.

On the 1st day of January, 1816, complainant, Berryhill, and defendants, M'Kee and Greenway, entered into articles of partnership to carry on trade and merchandise in Nashville. Berryhill was to be the active partner. The firm continued to do business till the 8th of October, 1822, when they dissolved, and the effects of the firm were placed in the hands of E. H. Foster, Esq. as trustee, (who is also made defendant,) to collect and pay the effects of the firm to those entitled. Before the dissolution Berryhill endorsed a note, in the partnership name, for Thomas Ramsey, which had been previously endorsed by Wm. Campbell, which note was negotiated to the president, directors, &c. of the bank of the State of Tennessee.

The firm of Berryhill, M'Kee and Greenway were accommodation endorsers. The note was protested for non-payment. Suit was instituted against the maker and all the endorsers, and judgment recovered against them; and owing to the insolvency of those liable before Berryhill, M'Kee and Greenway, Berryhill has had to pay the greater part of the judgment, and Berryhill files his bill to recover contribution from M'Kee and Greenway, or, to have the joint effects in the hands of Foster, the trustee, made liable.

The articles of partnership do not in terms, or by any reasonable construction, authorize one of the partners to sign the name of the firm to an accommodation note, such as the one in question was. And it is very clearly settled that where the authority is exercised in the absence of an agreement to that effect between the partners, that as between themselves, the partners who do not make the endorsement are not bound. The question, when it arises between themselves, is a very different one from that which would arise where third persons are concerned who have taken the note in the fair course of trade without notice of the want of authority. See 19 John. Rep. 154: 5 Con. Rep. 574: 1 Wend.

Rep. 529. The answers of M'Kee and Greenway deny the authority to make the endorsement. NASHVILLE,
December, 1839.

It is insisted for the complainant that the endorsement against the firm is *prima facie* evidence of the joint liability of all the members of the firm, and that this presumption is not removed. The court is of a different opinion. The bill, answers of defendants, and the articles of co-partnership, all negative the idea that Berryhill had any authority to use the name of the firm for any such purpose.

But the complainant's counsel relies upon a letter written by defendant, Greenway, to Berryhill, dated 11th January, 1823, in which he says: "I regret extremely to learn by yesterday's mail that we are to sustain so serious a loss by your endorsement for Ramsey, and the whole is likely to fall upon the concern." This letter was written after the dissolution, and therefore could not affect the rights of others. The tone of this letter shows surprise, and that the writer had for the first time come to the knowledge of the endorsement for Ramsey, and believing, as he no doubt did, that he was liable to the holder of the note, it accounts for the phraseology of the letter; and it by no means, in the opinion of the court, ratifies the endorsement, nor does it prove any authority ever did exist to endorse the note.

We are of opinion that the bill be dismissed. Let the decree be reversed and the bill dismissed.

Berryhill
v
M'Kee.

NASHVILLE,
December, 1839.

VALENTINE vs. COOLEY, et als.

Valentine
v
Cooley.

The act of 1794, ch. 1, sec. 10, providing that "all writs and other process, except *subpoenas* for witnesses returnable immediately, shall be returned to the first day of the term to which the same shall be returnable," does not embrace within its spirit and meaning writs of *fiery facias*.

The act of 1803, ch. 18, sec. 1, giving the remedy by motion in certain cases against any sheriff, coroner or other officer who shall fail to return any execution in his hands on the second day of the term to which the same is returnable, constitutes the second day the return day of the term; and a sale of land made on the second day of the term is a good and valid sale.

At the May sessions of the county court of Stewart county, in the year 1825, Nathan Ross, chairman of the county court of said county, recovered a judgment for the sum of four hundred and seventy-two dollars and forty-two cents against Jonathan Cooley and Richard Cooley, administrators of the estate of Wm. M. Cooley, dec'd. The plea of fully administered being found in favor of the administrators, the plaintiff had a judgment for damages, to be levied *de bonis testatoris*. It being suggested that real estate had descended to the heirs of William M. Cooley, deceased, the court ordered a *scire facias* to issue, which was accordingly done on the 26th day of May, 1826, and made known to the heirs at law of William M. Cooley, deceased. The defendants filed a demurrer to the *scire facias*, which was overruled, and an execution awarded to the plaintiff on the 3d day of May, 1826, to be levied of the lands and tenements which descended to them as the heirs at law of William M. Cooley, deceased, and which belonged to him in his lifetime. On the 27th day of May, 1826, an execution issued to the sheriff of Stewart county in the following words, to wit:

"State of Tennessee, Stewart county. To the sheriff of Stewart county, greeting: You are hereby commanded that of the lands and tenements of Richard Cooley, Jonathan Cooley, George Cooley, William H. Haggard and Rebecca, his wife, William G. Cooley, Thomas D. Beauchamp and his wife, Ann, Joseph Webster and his wife, Elizabeth, that descended to them as the heirs at law of William M. Cooley, in your county, you cause to be made the sum of four hun-

dred and seventy-four dollars and forty-two cents, to satisfy the damages which Nathan Ross, chairman of the county court of Stewart county, recovered against Richard Cooley and Jonathan Cooley, administrators of William M. Cooley, deceased, before the justices of our court of pleas and quarter sessions, at their May term, 1825; as also eleven dollars and eighty-six cents, which was adjudged by the court for his costs in that behalf expended; and also the further sum of thirteen dollars and twelve and a half cents, the costs on the *scire facias* against the heirs of William M. Cooley, deceased, whereof the said heirs are convicted, as appears to us of record, and have the monies before the justices of our court of pleas and quarter sessions to be held for the county aforesaid, at the court-house in the town of Dover, on the first Monday in August next, ready to render to the said Nathan Ross, chairman as aforesaid, and have you then and there this writ: Witness, William Williams, clerk of our said court, at office, in the town of Dover, on the 1st Monday in May, 1826, and the fiftieth year of American Independence.

NASHVILLE,
December, 1833.

Valentine
v
Cooley.

WILLIAM WILLIAMS, Clerk."

Upon this execution was the following endorsement: "Levied on the 10th day of June, 1826, on three hundred and forty-five acres of land lying on Dyer's creek in Stewart county, the place whereon Wm. M. Cooley resided in his lifetime, and where Mrs. Cooley, the widow, now resides; and after having advertised the land according to law, exposed the above tract of land to public sale at the court-house in the town of Dover, on the 8th day of August, 1826, and sold the same to William Bailey, county trustee, for the use and benefit of Stewart county, for the sum of four hundred and ninety-nine dollars and thirty-eight and one-half cents, the principal, interest and costs of the above suit, which satisfies this execution. August 8th, 1826."

Thomas Ward, the sheriff of Stewart county, who sold this land, conveyed it to William Bailey, trustee, by deed dated February 8, 1827. Bailey, trustee, conveyed it by deed, dated 12th July, 1832, to Christopher C. Clements. Clements turned Richard Cooley out of possession by writ of forcible entry and detainer, and on the 26th day of July, 1826, con-

NASHVILLE,
December, 1839.

Valentine
v
Cooley.

vveyed the land to Solomon K. Valentine, and put him in possession of the premises.

The land levied on was part of a six hundred and forty acre tract granted by the State of North Carolina, on the 26th day of November, 1789, to Richard Fenner, assignee of Joshua English. The grantee conveyed the whole tract to Robert Fenner, and Robert Fenner, on the 1st day of August, 1812, conveyed the premises in dispute to William M. Cooley, the ancestor of the plaintiffs below and of the defendants in this court.

On the 21st of June, 1836, an action of ejectment was instituted by Cooley's heirs against Valentine, in the circuit court of Stewart county. The cause was transferred to the Montgomery circuit court by affidavit.

At May term, 1839, it was tried before judge Martin, who charged the jury "that when a sheriff, by virtue of an execution in his hands, levies upon land, and the land is not sold on or before the return day of the writ, the sheriff could not, after the return day, sell the land without a *venditioni exponas*; and that if the sheriff, by virtue of the levy, sold the land on the Tuesday after the first day of the term to which the writ is returnable, the sale was void and communicated no title to the purchaser."

A verdict was rendered for the plaintiffs on the plea of not guilty. The defendant moved for a new trial, which motion was overruled, judgment rendered, and thereupon he appealed in error to this court.

Cooke, for the plaintiff in error, cited Cro. Eliz. 174: 2 Show. Rep. 485: 12 Mod. Rep. 5: 16 John. Rep. 567: 8 Mod. Rep. 225: Cro. Eliz. 181: 2 Ld. Ray. 775: Watson on Jud. and Ex. 189, 488: 2 Bur. 1188: *Pettiford vs. Sanders*, 1 Hay. 399: 16 John. Rep. —: 13 John. Rep. —: 1 Salk. 272: 8 John. 361.

Meigs, for the defendants, cited *Prescott vs. Wright*, 6 Mass. 20: 4 Hawk. 279: *Overton vs. Perkins*, 10 Yerger: 4 Mass. 402: 4 Hen. and Mun. 212: 2 Bur. 812: 4 J. Rep. 450.

TURLY, J. delivered the opinion of the court.

NASHVILLE,
December, 1839.

Valentine
v
Cooley.

The only question presented for the consideration of the court in this case, is, whether a sale of land under execution, made by a sheriff on the second day of the term of the court to which the execution is returnable, is void. This court, in the case of *Overton vs. Perkins*, 10 Yerger, held that a levy of an execution upon land vested no right thereto in the sheriff, and that if he sold after the return day of the execution without a *venditioni exponas*, the sale was made without authority, and was consequently void.

Then, to see whether the principle of this decision applies to the present case, it becomes necessary to ascertain at what period of time executions from our courts are returnable. If an execution be made returnable to a term of the court, and no particular day be specified when it is to be returned, either in the process itself or by the law, it is returnable to the term at any day thereof, because, by fiction of law, a term is but one day. Then the question is, is there a particular day specified in the process? If there is not, is there one by the law? There is none in the process: the order is to have the monies before the justices of the court of pleas and quarter sessions, at a court to be held for the county of Stewart, at the court-house in the town of Dover, on the first Monday in August. This order makes the process returnable to the term in general, and not to any particular day thereof. Is there a particular day prescribed by law? It is contended that there is: 1st. By the act of 1794, ch. 1, sec. 10; and 2d. By the act of 1803, ch. 18, sec. 1. The act of 1794 provides that "all writs and other process, except subpoenas for witnesses, returnable immediately, shall be returned to the first day of the term to which the same shall be returnable, and shall be executed at least ten days before the beginning of such term; and if any original or mesne process shall be taken out within ten days before the beginning of any term, such process shall be made returnable to the term next succeeding that which shall commence within ten days after taking out such process, and not otherwise; and all process made returnable at any other term, or executed at any other

NASHVILLE,
December, 1839

Valentine
v
Cooley.

time or in any other manner than by this act directed, shall be adjudged void upon the plea of the defendant."

This statute is loosely worded, but we think upon a close investigation it will be obvious that it was intended to apply to leading process, and not to final. It provides that all process shall be returnable to the first day of the term, and shall be executed at least ten days before. What is an execution of process? It is the performance of its mandates. Of a *capias ad satisfaciendum*, it is to arrest the body; of a *feri facias*, it is to make the monies. Now to say that a *feri facias* shall be executed ten days before court, would make it the duty of the sheriff to collect all monies within that time, and would make it illegal for him either to levy or sell thereafter, a thing that no one has ever thought of. Furthermore, it provides that if any original or mesne process be taken out within ten days before the term such process shall be returnable to the next succeeding term, and that all process made returnable at any other term, or executed in any other manner, shall be held void upon plea, &c. Now a *feri facias* is not embraced in the words original or mesne process, though it is in the words "all process." What, then, shall be done with a *feri facias* issued within ten days of the commencement of a term. It cannot be returnable to the succeeding term, because it is not so provided by the statute, and if the words "all process made returnable at any other term," prevents it being returned to the first term after issued, then it is returnable no where, and the consequence is that a *feri facias* cannot be sued out within ten days of a term, a principle which might be productive of much mischief. But furthermore, the statute provides that the process served in any other manner than therein prescribed shall be void upon plea. Now what does this mean but that the defendant must plead the matter in abatement if he wishes to take advantage of it, and that, if he enters his appearance and pleads in bar, the defect is cured? To talk about avoiding a *feri facias* by plea, would be something new in the law.

We therefore think that the statute of 1794, ch. 1, sec. 10, does not embrace a *feri facias* within its spirit and meaning, though it does within its words. The act of 1803 provides

that if any sheriff, coroner or other officer of this State shall fail or refuse to make return of any execution that may have come to his hands, issued from the clerk of the county or circuit where such sheriff, coroner or other officer resides, on or before the second day of the term to which said execution is made returnable, judgment may be rendered against him and his securities, on motion, for the money and costs mentioned in such execution. This statute makes it the duty of the officer to return his executions to the second day of the term, and inflicts a heavy punishment upon him if he neglects to do so. To say that executions are not returnable on the second day of the term would be to violate, as we think, the spirit and meaning of this act. We therefore think that executions are returnable to the second day of the term, and that no action can be had under them after that time; but they are in full force during the day upon which they are returnable, and a sale made on that day is as good and valid as if it had been made at any period of time before. Then the circuit judge erred in determining that the sheriff's sale, under and by virtue of which the plaintiff's claimed the premises in dispute, was void. The judgment will therefore be reversed, and the cause remanded for a new trial.

NASHVILLE,
December, 1839;

Elledge
v
Todd.

ELLEDGE vs. TODD.

If a jury, for the purpose of ascertaining what amount of damages shall be assessed, agree among themselves that each member of their body shall set down a sum according with his own judgment, and that the aggregate amount shall be divided by twelve and the result returned as their verdict, the verdict so ascertained and returned must be set aside and a new trial awarded.

The affidavit of one of the jurors is admissible evidence to establish the mode practised in fixing the amount of damages.

James Todd instituted an action of trover in the circuit court of Cannon county on the 17th day of June, 1838, against Isaac W. Elledge, to recover of him the value of a wagon, a bay horse, two wagon bridles, two horse collars,

NASHVILLE,
December, 1839.

Elledge
v
Todd.

&c. &c. This property he alleged belonged to him, that it was worth five hundred dollars, and that it was converted by Elledge to his own use. Elledge pleaded not guilty; issue was taken upon this plea, and at the May term, 1839, the honorable Edwin A. Keeble, special judge, presiding, the cause was submitted to a jury, who returned a verdict of seventy-seven dollars against the defendant, Elledge. Elledge moved the court for a new trial, and as the ground of said motion, amongst other things, exhibited the following affidavit:

"In this cause Joseph Ramsay makes oath that he was one of the jurymen who tried the case of *Todd vs. Elledge*; that the jury were divided and could not agree, and that they never could have agreed upon the verdict returned but for the fact of having previously agreed that each member of the jury should set down a sum, that they should then add the several sums together and divide the aggregate amount by the number of the jury, and the sum so ascertained should be their verdict. The jurymen then proceeded each to set down their respective amounts. One of the jurymen set down two hundred and fifty dollars; another set down nothing. The several sums were then added up, and the aggregate was accordingly returned as their verdict. Affiant confidently believes that this was the only way a verdict could have been rendered in the cause."

The court refused to set aside the verdict, but rendered a judgment for the damages assessed. The defendant took his bill of exceptions to the opinion of the court and obtained an appeal in the nature of a writ of error to this court.

Ready, for plaintiff in error. 1. The court should have granted a new trial for the misbehavior of the jury. 15 Johnson, 87: 1 Cowen, 238.

2. The affidavit of a juror is competent evidence of the fact of misbehaviour. 3 Cain's Rep. 57: 1 Randolph, 39.

H. M. Burton, for the defendant in error, cited *Cassell vs. Franklin*, 2 Ten. 201: *Dana vs. Tucker*, 4 Johnson, 487: *Cowperthwaite vs. Jones*, 2 Dallas, 55: *Crawford vs. State*, 2 Yerger, 65: *Hudson vs. State*, 9 Yerger, 410.

TURLEY, J. delivered the opinion of the court.

NASHVILLE,
December, 1839.

Hledge
v
Todd.

The question in this case is presented upon the correctness of the opinion of the court below in disallowing a new trial upon the affidavit of a juror stating in substance, that the jury, for the purpose of ascertaining what should be the amount of damages assessed, agreed among themselves that each member of their body should set down a sum, according with his own judgment, and that the aggregate amount should be divided by twelve and the result returned as their verdict, which was done.

This affidavit was admissible, its truth is not contradicted, and we think that it furnishes a legal ground upon which a new trial should have been granted.

In the case of *John Baker vs. Thomas Bennett*, determined by this court at Knoxville, in July, 1839, it is held "that a jury shall not agree among themselves that each shall specify the amount for which he is willing to find a verdict, divide the whole by twelve, and return the sum thus produced as the amount of their deliberations, because it is in the nature of gambling for a verdict, and places it in the power of one juror to make the amount unreasonably great or small." This case is in point, although in it the new trial was refused, because it was thought that no such agreement had been made by the jury.

Reverse the cause, and let it be remanded for a new trial.

NASHVILLE,
December, 1839.

NORMENT vs. SMITH.

Norment

v
Smith.

Where a suit has abated by the death of either plaintiff or defendant, it is within the equity of the statute of 1715, ch. 27, sec. 6, to permit a fresh action to be brought within a year after such abatement.

The adverse possession of a slave for more than three years vests the title with the possession. *Kegler vs. Miles, M. and Y.*, 426.

The possession by the testator of property of which he had no right cannot be connected with the possession of his executor so as to enable the executor to hold by virtue of the statute of limitations.

If an executor takes and detains property of which his testator had possession, but no title, he will be held individually liable in detinue for the wrongful detainer.

Meigs, for plaintiff in error.

Fogg and Campbell, for defendant.

GREEN, J. delivered the opinion of the court.

On the 27th of February, 1829, the present complainant sued Samuel G. Smith in the Smith circuit court, in detinue, for the negro boy Robin, now in dispute. Smith had obtained possession of Robin the 7th of June, 1828. The cause remained undisposed of until the 1st of September, 1835, when Smith died. At the October term of the court his death was suggested, and at the April term, 1836, the action of detinue was declared to have abated. Robin came into the hands of Thomas Smith, the present defendant, who is the executor of Samuel G. Smith; and this bill was filed against him to recover the negro the 4th of February, 1837. The 4th section of the statute of limitations, 21 James I, ch. 16, (of which an act of 1715, ch. 27, sec. 6, is in substance a copy,) provides, that where the plaintiff had obtained judgment which was reversed for error, or where a verdict had passed for the plaintiff, and the judgment was arrested and judgment given that the plaintiff should take nothing by his writ, in such case, the plaintiff, his heirs, &c. may commence a new action within one year after such judgment is reversed, or such judgment given against the plaintiff, and not after.

It has been adjudged to be within the equity of this provision of the statute to permit a fresh action within a year where the suit had abated by the death of either party. Bl. on Lim., 111, *et seq.*: Angel on Lim., 325, *et seq.*

NASHVILLE,
December, 1838.
Normant
v
Smith.

In this case the suit was commenced seventeen months after the death of Samuel G. Smith, although the suggestion of his death and record of abatement were made in less than a year before this bill was filed, yet the suit in fact abated at the death, and consequently, this suit was not brought within such reasonable time as to be within the equity of the 6th section of the act of 1715.

But the complainant relies principally on the ground that Thomas Smith is guilty himself of a wrongful detainer, for which he is liable, and that he cannot connect his possession with Samuel G. Smith's possession so as to defend himself under the statute of limitations.

How this question shall be determined must depend upon the effect of Samuel G. Smith's possession upon the title. Ever since the case of *Kegler vs. Miles*, Mar. and Yer. 426, it has been held that adverse possession of a slave for more than three years vests the possessor with the title. But Smith had not been in possession of Robin three years before the action of detinue was commenced against him. During the pendency of that suit his possession was neutralized, and as we have seen, abated by his death. No title could have vested in him by virtue of his possession. There was no time during his life at which he had acquired by the statute of limitation the title to the slave, and his death could not give efficacy to his possession which it did not have during his lifetime.

As the property in this slave had not been vested in Samuel G. Smith, the defendant does not hold him, as executor, but is personally guilty of an unlawful detainer, for which he is liable in this suit. The present cause of action commenced with the possession of the slave by the defendant. *Newsom vs. Newsom*, 1 Leigh's Rep. 85; *Jones and Glass vs. Littlefield*, 3 Yer. 133.

These cases show that an executor has no right to take into his possession a chattel to which his testator was not en-

NASHVILLE,
December, 1839.

Cage
v
Hogg.

titled, though such testator had been in possession thereof, and consequently, he cannot connect his possession with that of his testator. It is not like the case of a slave held by A for two years, and by him sold to B, who keeps possession for more than one year thereafter. In such case the possession of B may be connected with A, as this court decided in *Shute vs. Wade*, 5 Yer. 1, and constitute a title to the slave. Nor is it like the case of a new suit against the same party, or his representatives, for the same cause of action. In such case the pendency of a former unsuccessful suit would not be a 'good replication to a plea of the statute of limitations. Angel, 328. Here the defendant does not, as to this negro, represent Samuel G. Smith, and the cause of action is his own detainer and not that of his testator. As to the question whether the negro was loaned to Elgin by the complainant, we think there is no doubt.

The decree of the chancellor will be corrected in relation to the extent of the defendant's liability for hire of the negro, and he will be charged hire only from the time he came into his possession, and as to all the other matters, it will be affirmed.

CAGE vs. HOGG.

The legislature have the power to change the direction of a donation at any time before the donation has been appropriated or rights acquired under it.

Leroy H. Cage, the chairman of the county court of Smith county, on the 6th day of November, 1838, instituted an action of assumpsit in the circuit court of Smith county against Harvey Hogg, the agent of the commissioners of common schools. The plaintiff declared that the defendant had received the sum of five thousand dollars, which belonged to him, as chairman, and withheld it. The defendant pleaded non-assumpsit, and the following facts were spread upon the record, as exhibiting the matters in dispute between the parties:

"It is agreed in this cause that by virtue of an act passed on the 2d day of January, 1839, ch. 75, Smith county received as her proportion of the internal improvement fund in Middle Tennessee the sum of — dollars, which said sum was paid over to the bank agent for Smith county on the — day of —. The interest arising thereupon, together with the interest arising from the common school funds, was paid over from time to time by said bank agent to the clerk and treasurer of the board of common school commissioners for Smith county. J. W. Hardwicke, in May, 1832, who was the bank agent for Smith county, made a settlement with commissioners appointed by the court for that purpose, when it appeared by the result of that settlement that there was in his hands the sum of three thousand seven hundred and forty-eight dollars and sixty-three cents of internal improvement fund, he having kept a separate account of the internal improvement fund in his hands. About the 17th of August, 1835, the school fund and internal improvement fund for Smith county were amalgamated, or in other words, the said agent ceased to keep separate accounts of these funds. About the — day of — the whole amount of the fund so amalgamated was paid over to the defendant, as agent of the board of common school commissioners of Smith county, where the same has remained ever since, except such portions thereof as he may have paid over to the superintendent of public instruction for the State of Tennessee.

Upon these facts it is submitted to the court whether, by virtue of the several acts of the general assembly, passed 2d day of January, 1830, ch. 75, 14th day of January, 1830, common schools, 17th December, 1831, ch. 43, sec. 8, and the various acts of the assembly upon the subject of common schools and internal improvement funds of Smith county, and by virtue of the 10th section of the 11th article of the constitution, the internal improvement fund originally belonging to Smith county has, by the provisions of said laws and the constitution, been converted into the common school fund of the State, so as to become a part thereof; or whether Smith county is still entitled to said fund as the in-

NASHVILLE,
December, 1839.

Cage
v
Hogg.

ternal improvement fund belonging to her as such. If the court shall be of opinion that the law is in favor of the plaintiff, it is agreed that the court may render judgment in favor of the plaintiff for the sum of three thousand eight hundred and forty-six dollars and forty-eight cents, and that the costs be adjudged according to the discretion of the court, subject to an appeal to the supreme court by either party."

On the 20th day of December, 1838, the parties appeared by their attorneys, and argument being heard upon the case, it was adjudged by the court that "the plaintiff take nothing by his suit, and that the defendant recover against the plaintiff the costs."

From this judgment of the circuit court, A. Caruthers presiding, the plaintiff prayed and obtained an appeal in the nature of a writ of error to the supreme court of the State at Nashville.

M'Lain for plaintiff, cited *Wally's heirs vs. Nancy Kennedy*, 2 Yerg. 554; *Officer vs. Young*, 5 Yerg. 320.

Trimble, for defendant.

TURLEY, J. delivered the opinion of the court.

This is an action brought by the chairman of the county court of Smith against the agent of the board of common school commissioners to receive that portion of the internal improvement fund belonging to Smith county, which, by the act of 1831, ch. 43, sec. 8, was appropriated to the common school fund for that county.

The action is sought to be maintained under the provision of an act passed by the legislature in 1837, ch. 83, which authorizes the county court of Smith to make such disposition of the internal improvement fund belonging to said county as to them shall seem proper, and to prosecute actions against any person having any of said funds in his hands who shall refuse to pay them over. Now the question is not as to the constitutionality of the act, but as to what constitutes the internal improvement fund of Smith county. That it cannot be that which was appropriated by the act of 1831 to the common schools of Smith county, is self evident,

unless that act be unconstitutional. That it is, has not been and could not be contended for with any hope of success. That the legislature have the power to change the direction of a donation to a county before it has been appropriated, or right acquired under it, we think too plain a proposition to require argument. This is all that has been done by the act of 1831, and we therefore think that the circuit court committed no error.

NASHVILLE,
December, 1839.

Dickerson
v
Wheeler.

Judgment affirmed.

DICKERSON vs. WHEELER.

PARTNERS.—The power which one partner has to bind his co-partner ceases on the dissolution of the firm.

After the dissolution of the firm one partner cannot, without the assent of his co-partner, endorse a note payable to the firm so as to pass the legal title in the note to the assignee.

On the 26th day of January, 1839, James W. Wheeler, as assignee, instituted an action of debt in the circuit court of Giles county, against Achilles A. Dickerson, John H. Walker and Carter White, upon a bill single of the following tenor:

“\$196 93: On or before the 25th day of December next I promise to pay Walker and White, or order, one hundred and ninety-six dollars and ninety-three cents, for value received of them. Witness my hand and seal.

“October 28th, 1837.

A. A. DICKERSON, [Seal.]”

The declaration was in the usual form, and set forth that “the said Walker and White, to whom said sum of money in the said writing obligatory specified was thereby made payable, afterwards, to wit, on the 18th day of April, 1838, in the county aforesaid, sold the said note to the plaintiff for a valuable consideration, and then and there assigned the same, by the name of Walker and White, to the said plaintiff, for value received, waiving the necessity of demand and notice, and then and there delivered said note so assigned to

NASHVILLE, the plaintiff," which said assignment was exhibited to the court.
December, 1839.

Dickerson
v
Wheeler.

The defendant Dickerson pleaded, "1. No assignment from Walker and White to the plaintiff, in manner and form as alleged in the declaration; and, 2. Payment;" and the said Walker and White pleaded "payment;" and issue was taken on these pleas.

At the June term, 1839, the cause came on for trial, when a verdict was rendered for the plaintiff for the debt and damages against the defendants. A new trial was moved for, the verdict set aside as to defendant Dickerson, and overruled as to the others. At the October term, 1839, the cause came on again for trial, when a verdict was again rendered in favor of the plaintiff for his debt and damages. A motion was made for a new trial, which was overruled, and judgment rendered on the verdict. The defendant then filed his bill of exceptions, which is in the following words:

"In this cause the plaintiff, after reading the pleadings, read to the jury the note, as above set forth, and offered to read to the jury the assignments thereupon, which was objected to by the defendant; whereupon the plaintiff proved that said endorsement had been made by one of the firm of Walker and White, to wit, by Carter White, and the same was then read to the jury. The defendant then proved that the firm of Walker and White was dissolved in 1836, before the endorsements on said note were made; and the question was, whether one partner, after the dissolution of the partnership, could, without the assent of his co-partner, assign a note by endorsement, payable to the firm before the dissolution, and thereby pass the legal title in the note so as to authorize the assignee to sue in his own name. Whereupon, the court charged the jury that, if in the due course of trade, and without fraud, one party assigned a note or bill single after the dissolution of the partnership, the endorsee would get a good title, and well might sue; and that if in this cause the jury was satisfied that the note was so assigned to the plaintiff by one of the partners after the dissolution, the plaintiff might well maintain his action, and in the absence of any thing else to bar his right, he would be entitled to

recover. The jury found for the plaintiff. The defendant moved for a new trial, which the court refused to grant; to which opinion of the court the defendant excepts, and prays that this, his bill of exceptions, may be signed, sealed and made a part of the record, which is done.

NASHVILLE,
December, 1859.

Dickerson
v
Wheeler.

EDMUND DILLAHUNTY, [Seal.]"

From the judgment of the court an appeal in error was taken.

Wright, for plaintiff. The only question in this case is, whether one partner, after the dissolution of the partnership, can endorse a note, payable to the firm, without the consent of the other partner, so as to convey the legal title, and enable the assignee to maintain a suit in his own name. I contend that he cannot for any purpose whatever, and that the circuit judge erred when he charged the jury that a partner had such power. *Chitty on Bills*, 8th Am. ed. from 8th Lon. ed. 65-6: *Thomason vs. Frere*, 10 East, 418: *Chitty on Bills*, same ed. 60: *Kilgour vs. Fynlison*, 1 Hen. Bla. 155: *Abel vs. Sutton*, 3 Esp. Rep. 108: *Watson*, 209: *Henderson, et al. vs. Wild*, 2 Camp. 561: *Wrightson, et al. vs. Pullan, et al.* 1 Stark. 375: 2 *Chitty's Rep.* 121: *Dolnan vs. Orchard*, 2 Carr and P. 104. In New York, *Sanford vs. Nickles and Forman*, 4 John. Rep. 224-6: *Whitaker vs. Brown*, 10 Wend. Rep. 175. In Massachusetts, *Whitman vs. Leonard*, 3 Pick. Rep. 177. In South Carolina, 2 Des. Rep. 40: 1 *M'Cord's Rep.* 18, 389. In Louisiana, *Offat vs. Breedlove*, 4 Miller's La. Rep. 31. See also *Bell vs. Morrison, et al.* 1 Pet. Rep. 370. The judgment should be reversed.

Combs, for the defendant, left no brief of his position and authorities of which the reporter could avail himself.

GREEN, J. delivered the opinion of the court.

This is an action of debt upon a note executed by Dickerson to Walker and White, and after the dissolution of the firm of Walker and White, it was assigned to the plaintiff by Carter White, one of the late firm of Carter and White. The defendant pleaded no assignment; and the question was,

NASHVILLE,
December, 1838.

Wilks
v
Fitzpatrick.

whether one partner, after the dissolution of the partnership, could, without the assent of the other partner, endorse a note, payable to the firm before the dissolution, so as to pass the legal title in the note to the assignee. The circuit court decided that the assignment was good to vest the legal title in the plaintiff, so that he might maintain this action in his own name. There was a verdict and judgment for the plaintiff, to reverse which, this writ of error is prosecuted. We think there is error in the judgment in this cause. The power which one partner has to bind his co-partner, ceases on the dissolution of the firm; otherwise his co-partners might still charge him by negotiating bills given during the partnership or notes executed to the firm. We concur with the supreme court of New York, in the case of *Sanford vs. Nickles and Forman*, 4 John. Rep. 224, where it says, "it is impossible to separate the right to endorse a bill by one passing the title from the legal responsibility on all those having an interest in it." Let the judgment be reversed.

WILKS vs. FITZPATRICK, et al.

In order to bind a wife by a transfer of a legacy due her she must be privately examined in court touching her consent to such transfer.

The fact that a wife joins her husband in a transfer of a legacy, for which her husband receives a valuable consideration, does not make such transfer valid against her on the ground that she participates in a fraud. The transferee is bound to know what legal rights he acquires, and what rights the law permits her to set up.

John Wilks made his will in Maury county, appointing his sons, Wm. Wilks and John Wilks, his executors, and died. He gave the whole of his property to his wife during her natural life, and provided that at her death all of his property, consisting "of negroes, stock of all kinds, household and kitchen furniture, farming utensils, &c." should be equally divided among his children and grand-children, as follows: "To Polly Dearin, wife of John Dearin, one share; William Wilks one share; John Wilks one share; Polly Moore, wife of John

Moore, one share; Nancy Holt, wife of Jeremiah Holt, one share; to his grand-children, William S. Wilks and Jane A. Wilks, one share, jointly; and one share jointly to his grand-children, Malinda J. Bills and Blackstone H. Bills." On the 20th day of January, 1836, John Dearin and his wife, Polly Dearin, executed a deed to Morgan Fitzpatrick in the following words:

NASHVILLE,
December, 1839.

Wilks
v
Fitzpatrick.

"This indenture, made and entered into this 20th January, 1836, between John Dearin and Polly Dearin, his wife, both of the county of Maury and State of Tennessee, of the one part, and Morgan Fitzpatrick, of the same county and State, of the other part, witnesseth, that for and in consideration of the sum of three hundred and eighty-five dollars to them in hand paid, the receipt of which is hereby acknowledged by them, the said John Dearin and his wife, Polly Dearin, have bargained, granted, sold, aliened, enfeoffed and confirmed, and by these presents do bargain, grant, sell, alien, enfeoff and confirm unto the said Morgan Fitzpatrick, his heirs and assigns, all the estate coming to them of and from the estate of John Wilks, deceased, late of Maury county and State of Tennessee, as expressed in his last will and testament, the same being one-eighth part of said estate, now in the hands and possession of Jane Wilks, relict of the said John Wilks, deceased; the estate consisting of negroes, stock, household and kitchen furniture, farming utensils, wagon, harness, &c. to have and to hold, and to hold the above named and bargained estate to the only proper use, benefit and behoof of him, the said Morgan Fitzpatrick, his heirs and assigns, forever, with all and singular the benefits arising from the same; and the said John Dearin and his wife, Polly Dearin, for themselves, their heirs, executors and administrators, covenant and agree to and with said Morgan Fitzpatrick, his heirs and assigns, that they will forever warrant and defend the title of the said property and estate, and every part and parcel thereof, to the said Morgan Fitzpatrick and his heirs and assigns, against the lawful claims and demands of all and every person or persons whatsoever setting up or pretending title thereto, or to any part or parcel thereof, either in law or equity. In testimony whereof, we, the said John

NASHVILLE, Dearin and Polly Dearin, have hereunto subscribed our names
December, 1839. and affixed our seals the day and year above written.

Wilks
v
Fitzpatrick.

JOHN DEARIN, [Seal.]

POLLY DEARIN, [Seal.]”

On the 20th day of February, 1836, this deed was duly proved by the oaths of two subscribing witnesses thereto, before the clerk of the county court of Maury county. The debts of the estate were discharged by a sale of a portion of the property, and the widow kept possession of the balance till her death, which occurred in the month of February, 1838. An agreement was entered into by the parties interested that a division of the property should take place. This was partially executed, the negroes only being divided. A negro, Bob, was assigned to Fitzpatrick, and delivered over to him, as entitled thereto, by virtue of the contract with John Dearin and his wife, Polly, above set forth. Difficulties ensuing in the division of the balance of the estate, a final adjustment was defeated.

William Wilks, executor, and Malinda J. Bills and Blackstone H. Bills, minors, suing by their guardian, filed their bill in the chancery court at Columbia against John Wilks, John Dearin and his wife, Polly Dearin, Morgan Fitzpatrick, Berry Moore and wife, Patsy, Jeremiah Holt and wife, Nancy, William S. Wilks, Thomas Robly and wife, Jane S., Joseph Edmondson and wife, Jane A., praying for a general adjustment and distribution of the balance of the estate, according to the rights of the parties.

The defendants answered the bill separately. John Dearin, in his answer, concurred in the propriety of an adjustment and distribution of the balance of the estate; admitted that he had received a portion of the estate from the hands of complainant; that he had sold the balance of his interest in the estate to Morgan Fitzpatrick; stated that he had no further claim upon the same, and set up an alleged interest “in right of his wife, in the estate of Jane Wilks, the widow of John Wilks, deceased.” Polly Dearin states in her answer that “after the death of the widow, the negroes of the estate of her deceased father, John Wilks, were divided amongst the legatees and their assignees, by consent of par-

ties, Morgan Fitzpatrick receiving negro boy, Bob, as the portion of respondent; that there was still a balance of the property undivided, in which she understands said Fitzpatrick claims the share of respondent; that she had filed her bill against him to have the transfer of negro Bob set aside, and to have the balance of the property claimed by Fitzpatrick allotted to respondent; that she is entitled to a share of said property as one of the legatees; that the same had accrued to her during her marriage with her co-defendant, and that although he had sold said slave, no provision out of the legacy had been made for her, and insisted that the court should protect her rights in this suit until her suit against Fitzpatrick should settle their rights."

NASHVILLE,
December, 1839.

Wilks
v
Fitzpatrick.

Fitzpatrick, in his answer, set up his claim by deed, as above set forth, to the entire legacy left by the will of John Wilks, deceased, to Polly Dearin. A receiver was appointed at the March term, 1839, with instruction to sell the property undivided and report the proceeds, and pay the same into the hands of the clerk and master, which was done, the amount of the same being six hundred and sixteen dollars and eight and one-fourth cents.

At the September term, 1839, chancellor Bramlett, being of the opinion that the claim set up by Morgan Fitzpatrick to the interest of Polly Dearin in the estate of John Wilks, deceased, under the transfer filed and exhibited, was void, ordered and adjudged that the said transfer be held for nothing, and that the balance of the estate on hand be distributed to the respective parties, in pursuance of the terms of the will, and that each party pay his own costs. From this decree Fitzpatrick alone appealed to this court.

Frierson, for complainant.

Cahal and Pillow, for Fitzpatrick.

Gandy, J. delivered the opinion of the court.

This bill is filed by one of the executors of John Wilks, deceased, against his co-executor and the legatees, for a settlement and final adjustment of the estate of his testator, according to the rights of the parties. Morgan Fitzpatrick,

NASHVILLE,
December, 1839.

Wilks
v
Fitzpatrick.

who is made defendant, claims the legacy of Polly Dearin, (who, together with her husband, John Dearin, are also defendants,) by virtue of a sale and transfer to him signed and sealed by John Dearin and his wife, Polly, on the 20th of February, 1836. Polly Dearin insists that she cannot be prejudiced by the execution of the transfer to Fitzpatrick, and that she is in equity entitled to a settlement, for her use, of the legacy due from her father's estate. The court decreed the portion of Polly Dearin to her, disregarding the transfer to Fitzpatrick. Fitzpatrick alone appealed to this court. It is well settled, that if a husband, or any person claiming in his right, seeks to reduce into his possession the wife's legacy or distributive share, a court of chancery will make a provision out of it for her. Clancy on Rights, 441, *et seq.* 10 Yerg. 559: 2 Story's Eq. 1403, *et seq.* But it is said that in this case the wife has assigned away her interest. The assignment produced can have no obligatory force upon the wife, as it was made without those solemnities courts of equity require in such cases. In order to bind a wife by a transfer of a legacy due her she must be privily examined in court touching her consent to such transfer. Clancy on Rights, 444: 4 Hay. 19: 3 Cowen's Rep. 599: 3 Ves. 469: 4 Ves. 18. It is insisted she was guilty of a fraud in joining her husband in the transfer and then setting up her equity against it. If this were so, the wife never could be protected in her rights; and all her deeds, while covert, though void in law, would be set up against her on the ground of fraud. But there is no pretence for the charge of fraud; no misrepresentation was made to Fitzpatrick by her, and he was bound to know what legal rights he acquired by the transfer, and what were the rights the law permitted him to set up against it. The decree will be affirmed, with the exception that the share of Mrs. Dearin must be paid to a trustee for her use. The costs will be paid as directed in the decree below, and the defendant, Fitzpatrick, will pay the costs of this court.

NASHVILLE,
December, 1839.

GILMAN vs. THE STATE.

Gilman
v
The State.

It is not necessary that it should appear of record that the witness, upon whose evidence an indictment for gaming has been found, was sworn in open court and sent to the grand jury to give evidence in that case.

If the witness be not sworn in open court in fact it is error, but the defendant must plead the matter in abatement.

T. W. Gilman was convicted of common gaming within the corporate limits of the city of Nashville, in the mayor's court, and sentenced to pay a fine of ten dollars and the costs of prosecution. He moved the court to arrest the judgment. The motion was overruled, judgment rendered, and the defendant appealed in error to this court.

E. H. Ewing, for plaintiff in error.

Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

The only question in this case is, whether, if it does not appear of record that a witness on whose evidence an indictment has been found was sworn in open court and sent to the grand jury to give evidence in that case, it will be error. We think it will not. In practice such an entry is never made on the minutes of the court. The clerk usually endorses on the indictment the names of the witnesses, and that they were sworn. This is done that the grand jury may have evidence that the persons who appear before them to testify have been sworn; and it is highly proper. But if the witnesses have been in fact sworn, their evidence will authorize the finding an indictment whether the fact that they were sworn be endorsed upon the indictment or not. True, if the witnesses be not sworn in open court, it is error; but the defendant must plead this matter in abatement.

Judgment affirmed.

NOTE.—*State vs. Tolls*, 5 Yerg. 364: *Jetton vs. State*, Meigs, 192: *State vs. Fellows*, 2 Hay. 34: *State vs. Cam*, 1 Hawk. 352: *Rez vs. Dickerson*, Russ. and Ry. C. C. 401: 2 Gallison, 364: 1 Chitty C. L. 320.

REPORTER.

NASHVILLE,
December, 1839.

GREGORY vs. BURNETT and WIFE.

Gregory
v
Burnett.

Where an appeal is taken to the circuit court from the judgment of the county court, making an appointment of guardian, by those contesting the appointment, if the transcript of the record from the county court is not filed fifteen days previous to the commencement of the first term of the circuit court occurring after the judgment below, the judgment of the county court, upon motion, must be affirmed. The failure to comply with the mandate of the statute precludes a re-hearing upon the facts of the case, and forever settles the legal rights of the contesting parties.

Keeble, for plaintiff in error, cited act of 1762, ch. 5, sec. 24; act 1794, ch. 1, sec. 65: N. & C. 90: 8 Yerger, 164: 7 Yerger, 103: 7 Yerger, 304: 5 Hay. 30: 7 Yerg. 143: *Wright's distributees vs. Wright and others*, M. & Yerg. 43: *Massingal vs. Tate*, 4 Hay. 30.

Hollingsworth, for defendant, relied upon the act of 1762, ch. 1, sec 24, C. & N. Dig. 370, and cited *Craddock vs. Pritchett*, Peck, 23.

TURLEY, J. delivered the opinion of the court.

Edward Gregory was, at the July term of the county court of Rutherford, appointed guardian of his grand-child, Sophronia Gregory; the appointment was contested by the defendants in error, the mother and step-father of the ward, and an appeal was prosecuted by them to the circuit court. The record from the county court was not filed within fifteen days previous to the commencement of the first term of the circuit court, and the defendant moved to have the judgment affirmed, under the provisions of the act of 1794, ch. 1, sec. 66. This the circuit court refused to do, but proceeded to re-hear the case, and changed the appointment as made by the county court. From this judgment of the circuit court the plaintiff in error appealed. We have examined the proof in this case, and think that the judgment of the circuit court was right upon the facts but wrong upon the law. The statute of 1794 is imperative; the 63d section provides that where any person is dissatisfied with any sentence, judgment or decree of the county court he may appeal; and the 66th

section requires that the record shall be filed in the appellate court at least fifteen days before the sitting of the term ensuing the appeal, and that if it be not done the judgment, sentence or decree of the county court shall be affirmed.

NASHVILLE,
December, 1839.

Carroway
v
Anderson.

We cannot make or alter the law. The judgment of the circuit court must therefore be reversed, and the judgment of the county court affirmed.

CARROWAY vs. ANDERSON.

To give validity to an agreement respecting the title and boundary of land there must be a writing between the parties evidencing the terms of the agreement; but it is not necessary that, in a suit upon such agreement, the declaration should allege the agreement to be in writing; it is matter of evidence.

Carroway instituted an action of trespass on the case in the circuit court of Overton county, on the 22d October, 1838, against Joseph Anderson, and at the February term of that court, 1839, he filed his declaration, in which he averred that the "defendant, in consideration that the plaintiff would agree to settle a certain controversy concerning the boundary of the land of the plaintiff and defendant, then and there being unsettled and in dispute, and in consideration that the said boundary line should be and run with the plaintiff's line to the defendant's fence, &c., and that he, the defendant, would pay the plaintiff so much as he, the plaintiff, had paid per acre to Bryant Breeding, being one thousand dollars for five hundred and sixty-eight acres, for all the land in litigation between the plaintiff and the defendant; and the plaintiff avers that he did then and there agree to said line, and make said line, run as aforesaid, upon the consideration aforesaid;" and plaintiff further avers that "said line so run included one hundred acres of disputed land," and that the defendant had not paid the plaintiff so much per acre, &c. &c.

There was another count in the plaintiff's declaration in which he averred "that the said defendant, in consideration that the said plaintiff would dismiss a certain action of ejectment then pending in the circuit court of Overton county,

NASHVILLE,
December, 1839.

Carroway
v
Anderson.

wherein the plaintiff in this action was plaintiff in that and the defendant in this action was defendant in that, and establish a boundary line dividing their premises, that he, the said defendant, would pay the plaintiff for all the land which he included, that had been purchased by the plaintiff, at the same rates which plaintiff had paid therefor; and the plaintiff avers that, in consideration of said agreement of the defendant, he did then and there dismiss his action of ejectment aforesaid, and establish the boundary line aforesaid, &c.'

The defendant filed a general demurrer to this declaration. The plaintiff joined in demurrer, and the honorable A. Carruthers, judge, sustained the demurrer, and gave judgment for defendant. The plaintiff appealed in error to this court.

S. Turney, for plaintiff in error.

A. Cullom, for defendant.

REESE, J. delivered the opinion of the court.

This is an action of *assumpsit* founded upon an alleged agreement between the parties, in order to settle a controversy respecting the title and boundary of land, that the defendant would pay the plaintiff a certain price per acre for all the land included within certain specified limits. The defendant filed a demurrer to plaintiff's declaration, which set forth the above agreement, upon the ground that such agreement is within the statute for the prevention of frauds and requires a writing. And manifestly this is so. The agreement was for the sale of land, and to be paid for per acre according to the quantity. No one can doubt that to give validity to such an agreement under the statute of frauds there must be a writing between the parties evidencing the terms of the agreement; but is it necessary that the declaration should set forth or allege the agreement to be in writing? We understand the law to be that it is not necessary. This is so stated in the case of *Forth vs. Stanton*, 1 Saunders, 211, note 2: "For," says that learned writer, "the statute has made no alteration in the mode of pleading, and consequently it does not appear upon the declaration whether there was

a promise in writing or not; it is matter of evidence only." NASHVILLE,
December, 1839.
And see also 2 Salk. 519: 3-Bur. 1800. The same principle is stated in Roberts on Frauds in these words: (202) "The statute has made no alteration in the method of pleading, either by addition or defalcation, so that as on the one hand the consideration continues necessary to be stated, agreeably to the rule at the common law, so on the other hand it is not held to be necessary, on account of the statute, to show by the declaration that the promise was in writing, but it is left to evidence, which last mentioned point rests upon the general rule distinguishing between cases wherein a matter has its origin in an act of parliament, and is thereby required to be in writing, and when an act of parliament makes writing necessary to a matter existing at common law, in the latter of which cases the thing need not be shown in pleading to be in writing, but in the former it must be pleaded with all the circumstances required by the act."

Carroway
v
Anderson.

As in the case before us there is perhaps, in point of fact, no writing, we regret the necessity imposed upon us to reverse the judgment of the circuit court rendered upon the demurrer. For us, we are satisfied that to give validity to an agreement such as is set forth in the declaration, a writing is necessary; if, in fact, it does not exist, all further contest in this case will be fruitless. But still, for the reasons stated, we are constrained to reverse the judgment, to overrule the demurrer, and to remand the cause to be proceeded in in the circuit court.

NASHVILLE,
December, 1839.

HUDDLESTON vs. HUGHLETT.

Huddleston

v

Hughlett.

A tenant in possession cannot become defendant in an action of ejectment unless he enters into the common rule to confess lease, entry and ouster, and causes himself by order of court to be so made, and any action he may take in the cause without so doing will be of no effect.

A writ in ejectment against the tenant in possession returned "executed" constitutes no evidence of the service of the declaration, and proof of such service is necessary.

This action was commenced by Hughlett's lessee in the circuit court of Hickman county on the 21st of February, 1839, against John W. Huddleston, the tenant in possession, for the recovery of one hundred and ten acres of land lying in Hickman county. At the March term, 1839, a judgment was rendered against the tenant in possession, John W. Huddleston. No appeal was taken from this judgment, but on the 1st day of May, 1839, upon the petition of Huddleston, judge Green ordered writs of error and supersedeas to be issued, which was done and the cause brought up for trial at the December term, 1839, at Nashville.

The facts are fully set forth in the opinion of the court.

Nicholson, for plaintiff in error.

Dew, for defendant.

REASE, J. delivered the opinion of the court.

This is an action of ejectment commenced in the name of William Thrift Hughlett, as lessor of the plaintiff, with notice to John W. Huddleston, as tenant in possession. There was no writ issued and served under the provisions of the act of 1801, ch. 2, nor any proof, by the return of the sheriff or otherwise, that the declaration and notice by reading, or the delivery of a copy, had been served upon the tenant in possession. At the same term, however, a writ of trespass on the case, in the name of Mary Hughlett against John W. Huddleston, had been executed and returned. John W. Huddleston did not enter into the common rule to confess lease, entry and ouster, and by leave of the court cause him-

NASHVILLE.
December, 1839.

Huddleston
v
Hughlett.

self to be entered defendant in the room of the casual ejector; but the following entry appears of record, to wit: "*Mary Hughlett vs. John W. Huddleston*. Ejectment. The defendant, by his attorney, comes and moves the court to dismiss this cause, because he says that the lessor of the plaintiff, William Thrift Hughlett, mentioned in the declaration, was dead before the commencement of this suit, which is not denied by the parties." This motion was refused, and on the motion of Mary Hughlett, by attorney, the name of William Thrift Hughlett was stricken out of the declaration and that of Mary Hughlett inserted, and the writ of trespass on the case in her name was changed to trespass with force and arms in ejectment; and a judgment by default was subsequently taken in the action of ejectment against John W. Huddleston, the tenant in possession, who prosecutes this writ of error. The case in the 6th volume of Yerger's Rep. 467, has determined that where a writ of ejectment under the provisions of the act of 1801, ch. 2, against the tenant in possession has been returned by the sheriff "executed," such return constitutes no evidence of the service of the declaration in ejectment, and proof of such service, by the return of the sheriff or otherwise, is as material where the writ issues under the provisions of the act of 1801 as where no such writ issues. The only question, therefore, in the case before us is, whether the entry from the record, above quoted, constitutes such an appearance as will make unnecessary the return of the sheriff, or other proof shewing the service upon the tenant in possession of the declaration, and as will justify and maintain the judgment by default rendered in this case. The entry in question, "*Mary Hughlett vs. John W. Huddleston*. The defendant, by attorney, comes," &c., is subject to two observations. 1st. There was no such suit; the suit, as shown by the declaration as well as the subsequent part of the entry, being in the name of William Thrift Hughlett, as lessor. 2d. The tenant in possession not having entered into the common rule, and until then having no legal right to appear by attorney or otherwise, the terms of the entry, "the defendant, by attorney, comes," &c., do not import that the actual but the casual ejector so came, &c.

NASHVILLE,
December, 1839.

Deer
v
Devin.

But waiving these considerations, and taking it for granted that the record shows that the tenant in possession made the motion in question and in the proper suit, we are of opinion that as the tenant in possession does not become defendant in the action except by entering into the common rule; so that is the only mode by which he can be said to enter his appearance. If, without doing so, he makes a motion in the cause which he has no right to do, the effect of such irregular presence and action in the case will not be to give him the advantage of being considered a party to the suit, nor will it exempt the lessor of the plaintiff from the necessity of showing the regular service of process in order to obtain a judgment by default and possession of the premises sued for.

The judgment below will therefore be reversed, and judgment be rendered for the plaintiff in error.

DEER and WIFE, et als. vs. DEVIN.

In Virginia a parol gift of a slave, accompanied and followed by a permanent and continuing possession, is good, and vests the title in the donee. 6 Randolph's Rep. 135.

A limitation in remainder in the case of a parol gift of a slave is void, and the absolute title vests in the donee for life, to whom possession is delivered. This is the law in Virginia and in Tennessee.

On the 25th day of July, 1839, Gilbert Deer and wife Susan, (formerly Susan Devin,) William Devin, John Devin, David Nowlin and his wife, Elizabeth, (formerly Elizabeth Devin,) all residents of the county of Marshall and State of Tennessee, presented their bill to the honorable Edmund Dillahunt, one of the judges of the circuit courts, verified by the affidavits of David Nowlin, Gilbert Deer and John Devin, three of the complainants. The bill charged that complainants, together with Lucy Beck, who resides in the State of Virginia, and for whom they file this bill as well as for themselves, are the legitimate children of Elizabeth Devin, and that Elizabeth Devin, their mother, was the legitimate daughter of Bryant W. Nowlin, deceased, who lived and died

in the county of Pittsylvania, in the State of Virginia; that Bryant W. Nowlin, their grand-father, in the year 1806, made a will, in which was contained the following clause: "I lend to my daughter, Elizabeth Devin, a negro girl, named Hannah, and her increase, during her natural life, and at her death, my will and desire is, that said negro and her increase be equally divided, by lot or sale as may best suit, among the children of my daughter, Elizabeth Devin, which she now hath or may hereafter have lawfully begotten, to them and their heirs forever, which she agreed to take for her part of my estate forever;" that said B. W. Nowlin died in the year 1810, leaving the deed of 1806 as his last will and testament; that this will was proven and registered according to the laws of Virginia; that said Elizabeth Devin took possession of said property under the will, and continued to hold it, putting up no other claim except that of a life estate until recently; that she now claims to be the exclusive owner of said Hannah and her children, amounting to fourteen in number; that she had sold one of the children of said Hannah, and appropriated the proceeds of the sale to her own benefit; that she declared she would sell the balance of them; that they were worth six thousand dollars. The bill insisted that, by virtue of the premises above set forth, they were entitled in remainder to the said Hannah and her increase, to take effect upon the death of Elizabeth Devin. The bill prayed that Elizabeth Devin, a resident of Marshall county, be made a party defendant to the bill, and that an attachment be issued, directed to the sheriff of Marshall, commanding him to take said negroes into his possession and to hold them subject to the final decree of the chancery court, unless said Elizabeth should enter into bond with approved security for their forthcoming to answer the decree, which should then be made in the premises. The bill further prayed that said Elizabeth be required to account for the value of the aforesaid slave by her sold, and for that purpose that a receiver be appointed, and that the other slaves mentioned should be hired out and the hire thereof be appropriated to the use and benefit of complainants until it should amount to the value of the slave so sold, to be kept and enjoyed by complainants

NASHVILLE,
December, 1839.

Deer
v
Devin.

NASHVILLE, paying to said Elizabeth the lawful interest on the value as it should fall due during her natural life.
December, 1839.

Deer
v
Devin.

On the said 25th day of July, 1838, his honor judge Dillahunt issued his order to the clerk of the chancery court at Shelbyville, commanding him, upon the complainants giving bond with security by him to be approved, in the sum of eleven thousand four hundred dollars, to prosecute their bill with effect, or in case of failure to pay all costs, charges and damages consequent thereupon, to issue an attachment as prayed for in the bill of complainants. On the 27th, the complainants filed their bill in the chancery court at Shelbyville, Bedford county, giving bond in conformity with the order of judge Dillahunt. The attachment was issued and executed, and defendant retained the negroes by executing bond in the sum of eleven thousand four hundred dollars with approved security, conditioned that she should not remove the said property beyond the jurisdiction of the court, and that it should be forthcoming to abide the final decree of the chancery court.

To this bill Elizabeth filed her answer on the 25th of September, 1838.

She admits that Susan Deer, Wm. Devin, Jno. Devin and Elizabeth Nowlin are her legitimate children, and that she was the daughter of Bryant W. Nowlin, who died in 1810 in the county of Pittsylvania in Virginia; that he made his will in 1806; that the clause inserted in the bill, from said will was correctly extracted; that his will was proven and registered in the said State and county; but denies that she took possession of said Hannah under said will, or that she had continued to hold her or her increase by virtue of the said will, or that she had never claimed more than a life estate in the said slave and her increase. On the contrary thereof, she insisted that she derived her title to said slave by virtue of a parol gift from her father in the year 1804, previous to the execution of said will, and that the gift was without restriction, condition, or limitation; that the possession was delivered to her at the time by her father, and had been continuous from the date of the gift till the filing of the bill; that

her title was absolute: and that she had always claimed Hannah and her increase as her absolute property.

NASHVILLE,
December, 1839.

Beck
v
Devia.

She alleged that in 1825, when she was about to leave the State of Virginia for the State of Tennessee, Richard Beck and his wife Lucy, for whose benefit with the others this bill, as therein stated, was filed, instituted their suit in the county court of Pittsylvania county, in chancery, in which bill they allege the same matters now alleged in this bill, and attempted to have respondent enjoined from removing said negroes from the State of Virginia upon the ground that respondent had only a life estate therein; that in that suit respondent set up the same defence urged in this bill, to wit: that said slaves were the absolute property of respondent, by virtue of a gift made in the year 1804, and possession delivered in accordance therewith; that complainant, Beck, and wife, replied to the answer of respondent, and the cause came on for hearing on the 24th day of November, in the year 1826, upon the bill, answer, replication and proofs, and that the *ex parte* order previously made, restraining this respondent from removing the said slaves from the State of Virginia, was discharged and the bill dismissed at the cost of the said Beck and wife. She insisted that the question involved in this suit was therefore adjudicated by a court of competent jurisdiction, and the rights of the parties, so far as W. C. Beck and wife and respondent were concerned, were settled conclusively. She admitted that Hannah had fourteen children since she came to her hands, and that she had possession of them all with the exception of one which she had sold for the sum of three hundred and fifty dollars, and that she had appropriated the said sum, with the exception of forty dollars, to the payment of the debts of complainants, William and John Devia and Gilbert Deer; that she had sold said slave with the full knowledge and acquiescence of complainants, so far as she had ever heard.

At November rules, 1838, the complainants filed a general replication.

The record from Virginia was filed on 28th September, 1839, which sustained the allegations of the answer in regard thereto, and much testimony was taken in the cause.

NASHVILLE. At the August term, 1839, it was set for hearing by the defendant. Amongst a mass of contradictory and unsatisfactory testimony relating to so remote a transaction there are some uncontroverted positions of fact.

Deer
v
Devie.

It appears that Bryant W. Nowlin made his will in 1806 and died in 1810; that he had, at his death, thirteen children, amongst whom was the defendant; that he was possessed of a tract of land and eleven negroes at his death; that one of his children had been provided for previously to the execution of the will; and that two years before the execution of the will, in the year 1834, the slave Hannah, at about the age of fifteen years, was delivered to defendant in full discharge of her claims against her father's estate; that at the death of Bryant W. Nowlin the defendant set up no claim to any other portion of his estate, and it does not appear satisfactorily that she assented to its provisions or objected thereto; that the will was proven and registered in Pittsylvania county, Virginia; that the decedent directed, after payment of his debts, that his wife should hold his land (one hundred and fifteen acres) during her natural life, and that at her death it should be sold and the proceeds equally divided between eleven of his children, of which defendant was not one; and that when his youngest son should become of age, (in the year 1810,) the eleven slaves should be equally divided by lot or sale amongst the same eleven children, to be held by them and their heirs forever; that the defendant claimed and received nothing from her father or her father's estate except the slave in question; that her possession of Hannah from 1804 had been continuous and unbroken.

In the lapse of thirty years the descendants of Bryant W. Nowlin scattered over the valley of the Mississippi in the States of Missouri, Tennessee and Mississippi, and they being the chief witnesses in regard to a family transaction, their testimony, collected from remote points, presents the most contradictory accounts of the facts. One of the sisters states that there was an absolute gift of the slave, whilst various other witnesses state that the defendant claimed only a life estate in the property till the period of 1825, when she attempted to remove them from Virginia, and her attempt

was resisted and delayed by the complainant, Beck, and wife, by bill in chancery. It seems to have been the understanding of most of the children of Bryant W. Nowlin, from the year 1804, the date of the delivery of the possession, that the defendant had received the slave from her father as a gift during her natural life, limited, in remainder, to her children.

NASHVILLE,
December, 1839.

Deer
v
Devin.

The chancellor, Bramlett, being of opinion that the negro woman Hannah, and her children, were, by the last will and testament of Bryant W. Nowlin, loaned to the defendant during her life, and that the absolute title to the said slave, at the death of said E. Devin, was bequeathed to her legitimate children, decreed that complainants were entitled to them at the death of defendant; and believing that their rights were endangered by the acts of the defendant, ordered that said Elizabeth Devin give a bond with good and sufficient security, in the sum of ——— dollars, to the clerk and master, conditioned that said Elizabeth have the said Hannah and her increase forthcoming at her death, to be divided equally amongst her legitimate children, in accordance with the provisions of the will of B. W. Nowlin, and in the event that said Elizabeth failed in the course of six weeks from the date of the decree to give such security, that the clerk and master should take the said negroes into his possession as receiver; that he should hire them out, pay the proceeds of their labor to the said defendant from time to time, as the same should be collected, and that she have the said slaves ready at the death of said E. Devin to be delivered to the complainants. The court further ordered that, in the event that defendant failed to give security, as required by the decree, she should deliver the said slave to the clerk and master upon his application for them. The court further ordered that she pay the costs of this suit.

From this decree the defendant prayed and obtained an appeal to the supreme court.

E. J. Frierson, for the defendant. 1. The defendant acquired a good title to the property in controversy by virtue of the statute of limitations. She held it from 1804 till 1810.

NASHVILLE,
December, 1839.

Deer
v
Devin.

There was no pretence that she held it during this period by virtue of a will, the contents of which were not known even to his own children till his death. On this point the only controversy which can arise is as to the character of the possession. If the defendant took possession of the slave by virtue of a parol gift, and if a parol gift of a slave be void by the laws of Virginia, still it fixes the character of her possession, and establishes the fact that she held the slave as her own adverse to the claim of all others. The presumption of law is that she as donee held for herself. This presumption is not rebutted. The statute of limitations therefore divested Bryant W. Nowlin previous to his death of all interest in the slave, and the clause in his will imposing a limitation upon the title of the defendant was void.

2. If it be admitted that Bryant W. Nowlin made a parol gift of this slave, with limitation in remainder to children of defendant, to take effect after her death, what would be the effect of such a state of facts upon the rights of the parties? Whatever may be the laws of Virginia in regard to a parol gift of the entire and absolute interest in a slave, a gift by parol of a life estate would be good. A remainder created by parol is void, both by the laws of Virginia and of this State. What becomes of the remainder interest where the remainder is void and the life estate valid? Does it revert to the donor or grantor, or does it vest by operation of law on the owner of the life estate? It vests undoubtedly in the owner of the life estate. 10 Yer. 511.

Nicholson, for the complainants, commented upon the facts to show that the clause in the will limiting the right of the defendant in the slave to a life estate with a remainder to her legitimate children, was made in conformity with the views of the testator at the time he delivered the slave to his daughter, and that she received the slave with that understanding, kept possession of her with that understanding, acquiesced in the provisions of the will, and at various and remote periods, during a series of years, declared that she held a life estate only. There was no gift previous to the will, but only a promise or agreement to give by will. The

title of the defendant is derived from the will, and consequently the decree of the chancellor is correct.

NASHVILLE,
December, 1839.

Deer
v
Devlin.

The statute of limitations is not pleaded by the defendant and is not relied on in the answer and cannot now be set up.

Meigs, on the same side. There can be no presumption of a gift in this case deduced from the possession, because there is no clear evidence under what title the possession was taken and continued. If under the will, then the onus was on the defendant to show a gift by independent evidence, by evidence other than the mere fact of possession. In this case the proof stands *in equilibris* whether the possession was under the will or under a previous gift, consequently a gift is not to be inferred from the possession, that being as consistent with the will as with the gift.

RESSE, J. delivered the opinion of the court.

We have looked into this record with entire willingness to maintain, if we could, the decree of the chancellor; for if the expectations of the complainants to enjoy ultimately the property in dispute shall depend, not upon the will of their father, but upon the dying intestate of the defendant, without alienation, their expectations however, from the ties of nature reasonable, may perhaps be disappointed. But in point of law, one thing is undeniable, namely, that in Virginia, a parol gift of a slave, accompanied and followed by a permanent and continuing possession, is good, and vests the title in the donee. See 6 Randolph's Rep. 135. And whether we look into all the proof which the chancellor felt himself at liberty to do or not, one thing, as a matter of fact, is satisfactorily established, namely, that the father of the complainants and defendant gave to the defendant the negro girl Hannah, the mother of all the rest, in the year 1804, in full of all her future claims upon his estate. She was so received by her; possession was then delivered to her, and has continued with her ever since. This, by the law of Virginia, made the negro hers. There is no pretence that she gave back and delivered possession of the negro to her father. Of

NASHVILLE,
December, 1839.

Hinkle
v
Currin.

course, in 1806, when the will bears date, or at the time of his death, some years after, the testator had no interest in or disposing power and control over the negro in question. He devises in the will nothing but the negro to the defendant for life, with remainder to her children. So no question of election arose, and the executor of the will proves, both in the case in Virginia and in this State, affirmatively that the defendant claimed or received no distribution under the will. If we could look into the affidavits made by the complainants in the case in Virginia in maintenance of their own claims, which we are satisfied we cannot, still, the most they would establish would be that the parol gift of 1804 was to the defendant for life, with remainder to the complainants. And then by the law both of Virginia and Tennessee the limitation in remainder in the case of a parol gift of a slave must be held to be valid, and the absolute title would vest in the donee for life, to whom possession was delivered.

So we are of opinion that the decree must be reversed and the bill be dismissed, but without costs.

HINKLE vs. CURRIN.

A garnishee has a right to file his bill of discovery against a plaintiff in an action at law and compel him to say whether his judgment against the debtor has not been satisfied in whole or in part, and to use the answer so obtained as evidence in the motion against himself.

It is not necessary that a bill of discovery should set out particularly the pleadings in a cause which is pending at law so as to show what precise issues are made by the parties. It is sufficient if the bill so describe the case that the court of chancery can see that an appropriate issue may be made.

Joseph Hinkle, a citizen of Lincoln county, was a stockholder in the Fayetteville bank. Robert P. Currin, a citizen of Williamson county, obtained a judgment against the institution for the sum of nine hundred and ten dollars and costs of suit. A *fi. fa.* issued upon this judgment to the sheriff of Lincoln, who returned that he could find no property whereon to levy it. Hinkle was then summoned to appear before

the county court of that county as a garnishee, and having appeared and being examined, a judgment was entered up against him and in favor of Currin for the amount of the judgment obtained against the bank. Hinkle appealed to the circuit court, and immediately filed this bill in the chancery court at Fayetteville, setting forth the above facts and charging that Currin "had been paid the full amount of his judgment;" that he "had believed that he could prove this fact by a witness, but that now he did not know that he could;" and that it "was important in the defence of this suit against him to have a discovery on oath from the plaintiff at law as to the fact of the payment of the judgment;" and praying that Currin might be compelled to answer whether "he had not received a full satisfaction of said judgment," and if he had not "received full satisfaction, whether he had not received part satisfaction thereof, and if so, how much."

NASHVILLE,
December, 1839.

Hinkle
v
Currin.

Currin demurred to this bill, and the cause came on for hearing at the August term, 1839, when chancellor Bramlett sustained the demurrer and dismissed the bill. The complainant appealed to this court.

Taul, for complainant.

J. W. Campbell, for defendant.

GREEN, J. delivered the opinion of the court.

This is a bill of discovery filed by the complainant, Hinkle, setting forth, that in 1829 the defendant obtained judgment against the Fayetteville bank for nine hundred and ten dollars besides costs; that an execution issued upon said judgment; and that the complainant was summoned, as a garnishee, to the county court of Lincoln, where the judgment had been rendered. Having appeared and been examined, the said court, at the October term, 1835, rendered judgment against him for nine hundred and ten dollars and thirty-six cents and costs; from which judgment he appealed to the circuit court, where the cause is now pending. The bill charges, that the defendant has long since been paid the full amount of his judgment against the bank, though complain-

NASHVILLE,
December, 1839.

Hinkle
v
Carrin.

ant does not know that he can prove such payment except by the defendant himself. He prays a discovery from the defendant, whether he has not received satisfaction for his said judgment in whole or in part, in order that the answer may be used as evidence in the case now pending in the circuit court against complainant as garnishee. To this bill the defendant demurred. The chancellor allowed the demurrer, and dismissed the bill. We think the court erred in sustaining this demurrer.

The act of 1811, ch. 89, sec. 1, (C. and N., 362,) authorizes a creditor who has obtained a judgment, and whose debtor has no property sufficient to satisfy the execution, to summon garnishees in the same manner as in cases of absconding debtors. The right of a party to hold a garnishee liable to answer depends upon the existence in his favor of an unsatisfied judgment against his debtor; for, if it be satisfied, or if the debtor have property out of which it may be satisfied, he has no right to summon a garnishee. If the judgment be satisfied, the party suing out the garnishee summons has no right to the effects of the debtor in the hands of garnishee; and surely the garnishee may resist his recovery of it by pleading the matter by reason of which his right to a recovery is barred. It is argued by the defendant's counsel that the bill does not allege that in the garnishee case there is any appropriate issue for the application of the testimony the bill seeks to obtain.

We do not think that it is necessary that a bill of discovery should set out particularly the pleadings in the cause which is pending at law so as to show what precise issues are made by the parties; it is enough if it so describe the case that the court of chancery can see that an appropriate issue may be made. This being done, it will be taken for granted that such issue is pending or will be formed by the parties.

Let the decree be reversed and the demurrer disallowed, and the cause remanded to the chancery court to be proceeded in.

JOHNSON vs. PLANTERS BANK.

NASHVILLE,
December, 1839.Johnson
v
Planters Bank.

The statute of 5 George I, is in force in Tennessee, and after verdict no judgment can be arrested from any variance in the declaration from the writ either in form or in substance.

On the 25th day of June, 1839, the Planters Bank of Tennessee issued a writ, returnable to the circuit court of Williamson county, against David Johnson, John Ray and Henry R. W. Hill, summoning them to appear before the said court at its July term, "to answer the president and directors of the Planters Bank of a plea of trespass on the case to their damage two thousand five hundred dollars." H. R. W. Hill acknowledged service of the summons. It was executed upon Johnson, and returned not found as to Ray. The plaintiff entered a *nole prosequi* as to Ray and filed a declaration in the form of an action of debt against Hill and Johnson at the July term, 1839, alleging that David Johnson, on the 25th day of April, 1838, executed two several obligations, each for one thousand dollars, by which he bound himself to pay said sums of money to John Ray at the Planters Bank, the one nine months after date and the other twelve; that Ray endorsed and delivered these obligations to H. R. W. Hill & Co. and H. R. W. Hill & Co. endorsed them and delivered them over to the Planters Bank; and that at the maturity thereof they were protested for non-payment. Hill made no defence, and judgment was entered against him by *nildicit*. On the record are the following words: "Payment and set off; Campbell for Johnson. Replications and issues; Foster and Fogg."

On Thursday, the 14th day of November, 1839, David Johnson, by his attorney, "moved the court for leave to withdraw the words "payment and set off" filed in this cause as pleas. This motion was overruled, and on the 20th November a verdict was rendered by a jury upon the issues joined for the sum of two thousand dollars debt, and eighty-seven dollars and thirty-two cents damages. A motion was then made to arrest the judgment of the court. This motion was also overruled and judgment rendered in conformity with the

NASHVILLE,
December, 1839.

Johnson
v
Planters Bank.

verdict, and an appeal in nature of a writ of error taken to the supreme court by Johnson alone by virtue of the provisions of the act of 1827, ch. 52.

J. W. Campbell, for plaintiff in error. 1. The court below erred in not permitting the defendant to withdraw the words "payment and set off," filed as pleas. They were nullities and should have been withdrawn upon the application of the party presenting them in lieu of pleas. 6 Yer. 314.

2. The writ is in case, the declaration in debt. The declaration here varies from the writ not in form only but in substance. The declaration changes "the nature of the action," contrary to the provisions of the act of 1809, ch. 49, Nich. and Car. 88. This statute does not permit the plaintiff to substitute debt for case, or covenant for debt at his option. He cannot change the character of his action indicated by his writ. This objection is fatal on motion in arrest of judgment or upon error. *Stamps vs. Graves*, 4 Hawks, 102; *Her-ring vs. Glisson*, 2 Dev. 156. These decisions are in accordance with the common law. 1 Lord Ray. 4: 1 Sanders, 317, note 3: 7 Term Rep. 299: 2 Wilson, 395: Tidd's Practice, 103, 124, 93, 301, 77, 80. This is a material variance and therefore not cured by a verdict. 6 Com. Dig. 44: Croke Eliz. 185, 823, 330, 622: 1 Tidd, 102. Though it may be insisted that this court has decided that appearance cures want of process, yet the doctrine is well settled in England that "if there is a vicious original on file, the court will not presume a good one; though had there been none," the defendant appearing, "the court would have presumed one and a good one." 1 San. 517.

F. B. Fogg, for defendant in error. Appearance and pleading over cure defects of process. 3 Hay. 203: 5 Yer. 104: 3 Hay. 44: *Garland vs. Chattle and Clough*, 12 Johnson 430: 12 Peters, 300: 2 Wheaton, 45. A variance between the writ and declaration is pleadable in abatement only. 11 Wheaton. The statute of 5 George I, provides that "after verdict judgment shall not be stayed or reversed for any defect or fault, whether in form or in substance, in any bill, writ, original or judi-

cial, or for any variance in such writs from the declaration or other proceedings." This is a statute of feoffails in force here and in North Carolina. Act of 1794, ch. 1: 4 Dev. 35, *West vs. Rutledge*.

NASHVILLE,
December, 1839.
Johnson
v
Planters Ban

GREEN, J. delivered the opinion of the court.

The only question in this case arises upon a motion in arrest of judgment for a variance between the writ and declaration. The writ is in case, and the declaration in debt. The defendant pleaded over to the declaration, upon which issue was joined, and there was a verdict for the plaintiff. By an act of 1794, ch. 1, all the statutes of Great Britain for the amendment of the law commonly called statutes of feoffails, and which theretofore had been in force in North Carolina, are declared to be in full force. The statute 5 George I, ch. 13, (5th vol. Brit. Stat. 43,) declares that no judgment shall be "stayed or reversed for any defect or fault, either in form or substance, in any bill, writ, original or judicial, or for any variance in such writs from the declaration or other proceedings." In the case of *West vs. Rutledge*; 4 Dev. 31, the supreme court of North Carolina enter into a full examination of the history of their legislation upon this subject, and came to a most satisfactory conclusion that this statute had always been in force there. It follows as a consequence that, by force of the act of 1794 above referred to, this act of 5 George I, is in force here. But it is insisted that this statute is limited in its operation by the act 1809, ch. 49, sec. 21, to cure a variance of form only; for by the latter act, it is provided that no amendment shall be allowed whereby the nature of the action shall be changed. Hence it is inferred that as this writ was not amendable by the act of 1809, the variance cannot be cured by the act of 5 George I. It is true, this writ could not have been amended so as to change the nature of the action, and had the defendants in the court below pleaded in abatement they would have defeated the plaintiff's action. But they chose to plead to the declaration in bar, and to have a trial of the cause upon its merits. Having done so, and a verdict having been found against

NASHVILLE,
December, 1839.

Parker
v
Swan.

them, the situation of the parties is very much changed, so that the statute of 5 George I, may have its full operation without at all conflicting with the act of 1809. The plaintiffs in error rely on the case of *Stamp vs. Graves*, 4 Hawks' Rep. 102, and the case of *Herring vs. Glisson*, 2 Dev. 156, as being opposed to and of more authority than the case of *West vs. Rutledge*, 4 Dev. 41. It is sufficient to say, that in the latter case the court reviews the decisions in the two former cases, and upon the most unanswerable reasons, overrules them; those cases are therefore to be regarded as of no weight whatever. We conclude therefore that the statute 5 George I, is in force, and that after verdict no judgment can be reversed for any variance in the writ from the declaration either in form or substance.

Let the judgment be affirmed.

PARKER and COLLIER vs. SWAN.

A judgment entered up by a justice of the peace in the following words, "judgment in favor of the plaintiff for sixty-one dollars and eighty-three cents and costs," is a valid judgment in conformity with the warrant and against all the defendants therein named.

A description of land in a levy in these words, "seventy acres of land belonging to John Doak lying on the waters of Stone's river," is sufficient; the title does not rest on the description in the levy; all that is necessary in the levy is some general description that will by reasonable intendment connect it with the sale and deed.

Where land is levied on by a constable and sold by order of court the title of the purchaser relates to the time of the levy made by the constable.

Moses Swan instituted this action of ejectment in the circuit court of Rutherford county against Parker and Collier, and at the July term, 1839, the cause was submitted to a jury under the charge of the honorable A. J. Marchbanks. A verdict was rendered in favor of the plaintiff for seventy acres of land. A motion was made to set aside the verdict but overruled, and a judgment rendered in conformity therewith. The defendants appealed in error to this court.

Ready, for plaintiffs in error, contended: 1. That the judgments under which this land was sold were void for uncertainty. A warrant is issued against Blakely, Ashbrooks and Doak, and executed upon them; the justice endorses upon the warrant, "Judgment in favor of the plaintiff for sixty-one dollars and eighty-three cents and costs." Against whom is this judgment rendered? Will it be answered that it is against all three persons named in the warrant? True it may have been; but it is equally true it may have been against Blakely only, or against any one of the defendants named in the warrant. The endorsement made on the warrant would apply as well to a judgment against Blakely as to a judgment against all of the defendants. It would be as much a judgment in favor of the plaintiff if against one as against all, and the justice's endorsement would be as true in one case as the other; to resort to a presumption to sustain a judgment would be carrying the doctrine of presumptions further than in his opinion it had been hitherto carried. If we could assume the fact to be, that in suits by warrant against several defendants, in which judgment is rendered in favor of the plaintiff, judgment is always rendered against all of the defendants, then we could know with certainty that the justice of the peace did render a judgment against Doak. This, however, would be the assumption of a fact to be true which we know to be untrue. This judgment is therefore void for uncertainty; and if void, the purchaser could take no title by his purchase.

2. The levy contains no sufficient description of the land and is bad for its vagueness and uncertainty. It shows that there was seventy acres belonging to Doak levied on, and that it laid on the waters of Stone's river, but in what county or civil district or by whose land it is bounded does not appear. In *Pound vs. Pullen's lessee*, judge White dwells with much force upon the dangerous consequences flowing from sustaining such vague levies. See 3 Yer. 338. There is no proof introduced to render this levy certain; it cannot therefore sustain the subsequent sale.

3. The circuit judge charged the jury that the title of the purchaser related to the date of the levy by the constable.

NASHVILLE,
December, 1839.

Parker
v
Swan.

NASHVILLE,
December, 1839.

Parker
v
Swan.

This was error. The lien can only operate from the judgment of condemnation. This question is to some extent a new one in our courts, and in settling it the court should look at the policy of our law on all subjects connected with the sale, transfer and divestiture of title to lands. It is a favorite object with our laws to protect the rights of *bona fide* purchasers against prior sales, liens, &c. Such was the sole object of our registration acts of 1831 and 1833. The 7th and 8th sections of the statute of 1831 changes in a great degree the law in regard to the lien of judgments on lands for the protection of *bona fide* creditors without notice of such judgments. The same policy carried out will decide the question as to the lien of the levy in favor of the plaintiffs in error; the adoption of a different rule will open the door for the commission of innumerable frauds. The proceedings of justices of the peace are not matters of record, nor are the proceedings of a constable acting upon process issued by them, nor are persons bound by law to be cognizant of them. Are we to be told then that the levy of a justice's execution defeats a purchaser without notice by its lien? The rule in regard to personal property is different for a good reason; the officer at the time of the levy seizes the property, and the levy vests the right to the possession in the officer. There is no danger of imposition then being practised on innocent purchasers. He contended that the lien should operate from the date of the judgment of condemnation and not before. The cases of *Ellar vs. Ray*, 2 Hawks, 568, and *Lash vs. Gibson*, 1 Murphy, 266, were cases of conflict between creditors, in which the law would give the preference to the most vigilant. They do not apply to this case.

Keeble, for defendant, cited *Simmons vs. Ward*, 6 Yerger, 521; *Stinson's lessee vs. Russell*, 2 Ten. 44; *Campbell vs. Lush, et al.* 4 Hay. 60; *Darby's lessee vs. Russell and Hicks*, 5 Hay. 139, 142; *Overton vs. Perkins, et al.* Mar. and Yerg. 367; *Mitchell vs. Lipe*, 8 Yerger, 183; *Porter's lessee vs. Cocke, Peck*, 39; *Lash vs. Gibson*, 1 Murphy's N. C. Rep. 266; 2 Hawks, 268.

GREEN, J. delivered the opinion of the court.

NASHVILLE.
December, 1839.

Parker
v
Swan.

This action of ejectment was brought by the defendant in error to recover a tract of land which he claims by virtue of sheriff's deed, reciting that the same had been levied on and sold as the property of John Doak. The record of the judgment under which the sale was made shows, that on the 6th of May, 1830, two suits were commenced by warrant before a justice of the peace, wherein Moses Swan was plaintiff, and William Blakely, Moses Ashbrooks and John Doak were defendants. The warrants were executed and returned to the justice of the peace, who rendered judgment for the plaintiffs, endorsing it on the warrants in the following words: "May 7th, 1830: Judgment in favor of the plaintiff for sixty-one dollars and eighty-three cents and costs;" execution was issued by the justice and was levied on the land in dispute the 12th of May, 1830, and at May term of the county court of Rutherford an order of sale was made, a *venditioni exponas* issued, the seventy acre tract of land was sold to Swan, and a deed, dated 5th April, 1831, was executed to him by the sheriff, which was duly acknowledged, and on the 21st of April, 1831, was registered according to law. The endorsement of the levy of the justice's execution upon this tract of land is in these words: "Levied on the right, title, claim and interest that John Doak has in and to seventy acres of land lying on the waters of the west fork of Stone's river; no personal property to be found." The defendants claimed title by virtue of a deed from Doak to Isaac Killough for one hundred and forty-eight acres, and by mesne conveyance from him. The deed from Doak to Killough is dated 5th May, 1830, and registered 15th July, 1830.

I. It is contended, in the first place, that the justice's judgment is void for uncertainty. The words written on the warrant, "Judgment in favor of the plaintiff for sixty-one dollars and eighty-three cents and costs," constitute certainly a very brief record of the determination of the case. But the plain meaning is that the judgment is rendered against all the defendants. If it had been against one only and in favor of the rest, it would not have been true that judgment

NASHVILLE,
December, 1839.

Parker
v
Swan.

had been given in favor of the plaintiff in the whole case, for it would have been in part against him. We think there is reasonable certainty in the judgment; and to require more of these inferior tribunals would be to defeat entirely their jurisdiction.

2. It is next insisted that the levy contains no sufficient description of the land, and that the sale therefore was without authority and void. It is certainly true that the description given in the levy is somewhat vague; it is only described as "John Doak's seventy acres of land, on the waters of the west fork of Stone's river." In the case of *Vance vs. M'Nairy*, 3 Yerg. 177, however, the levy was not more certain, and the court held it to be sufficient. The title does not rest upon the description in the levy, but the deed follows and defines its locality with sufficient precision. All that is necessary in the levy is some general description that will, by reasonable intendment, connect it with the sale and deed, so that a tract of land different from the one levied on may not be sold and conveyed. This, we think, is given in the levy before us.

3. It is contended the court erred in telling the jury that the plaintiff's title related to the levy by the constable upon the land, and was not limited to the date of the deed or to the order of sale by the court. The case of *Lash vs. Gibson*, 1 Murphy's Rep. 266, and *Ellar vs. Ray*, 2 Hawks, 568, sustain the opinion of the court below, and we think proper to follow those cases.

Let the judgment be affirmed.

BLEDSE vs. CHOUNING.

NASHVILLE,
December, 1839.Bledsoe
v
Chouning.

Where a plea is bad, and the issue is thereby rendered immaterial, it is well settled that a replender will not be awarded at the instance and in favor of the party who commits the first fault by pleading a bad plea.

On the 1st day of February, 1838, Benjamin J. Bledsoe instituted an action of trespass on the case in the circuit court of Overton county against William Chouning, and at the June term following the plaintiff filed his declaration in the following words:

"Benjamin J. Bledsoe, by attorney, complains of William Chouning, summoned to answer him of a plea of trespass on the case to his damage, &c. for that on the 17th day of January, 1838, in the county of Overton, the defendant, by the description of "William Chouning," by a written agreement signed by him, of that date, which is now here shown to the court, acknowledged that he had received from the plaintiff by description, B. J. Bledsoe, one hundred dollars, which the defendant promised to lay out for tobacco for the use of the plaintiff, or that he, the said defendant, would return the said one hundred dollars to the plaintiff. Now the plaintiff avers that the defendant, not regarding the promise made by him as aforesaid, did not lay out said one hundred dollars in tobacco for the use of the plaintiff, nor return the said one hundred dollars to the plaintiff," &c.

The defendant filed his plea in words as follows: "The defendant comes, &c. and defends the wrong and injury, when, &c. and craves oyer of the writing in said declaration mentioned, which is read to him in the words and figures following, to wit:

"Received of B. J. Bledsoe one hundred dollars, with which I promise to buy tobacco or return the same to him.

"January 17, 1838.

WM. CHOUNING."

Which being read and heard, the defendant says the plaintiff his action ought not to have and maintain, because he says he did buy tobacco with the said one hundred dollars, and this he is ready to verify.

TURNER."

"Replication and issue.

CULLOM."

NASHVILLE,
December, 1839.

Bledsoe
v
Chouning.

A jury found this issue at the June term aforesaid in favor of the plaintiff, and assessed his damages to one hundred and eight dollars and seventy-five cents.

A motion was made to arrest the judgment, which was overruled, and judgment rendered in conformity with the verdict. There was an appeal from this judgment in the nature of a writ of error to the supreme court.

Turney, for the plaintiff in error, contended that the plea filed in this case was bad, that there was no issue for the jury to pass upon, and that a repleader should be awarded.

Cullom, for the defendant in error, insisted that the plea made a material averment, to wit, the performance of one of the alternatives stipulated to be performed. If the averment in this plea was true, it would have constituted a good defence to the action. This form of pleading conforms to the ancient mode. 1 Chitty's Pl. 464. If the plea be regarded at this day as informal, it is not immaterial; it contains matters of substance responsive to a material allegation in the declaration, and is good after verdict. 1 Chitty's Pl. 474, 631.

RESE, J. delivered the opinion of the court.

The defendant in error sued the plaintiff in error in an action of assumpsit, and declared upon the following writing, to wit:

"Received of B. J. Bledsoe one hundred dollars, which I promise to buy tobacco with or return to him.

"January 17, 1838.

WM. CHOUNING."

This writing, the declaration averred, purported that the defendant below was to buy the tobacco for the use and benefit of the plaintiff, or to return the money to him, and the breach assigned was, that the defendant had neither bought tobacco with the sum in question for the use and benefit of the plaintiff, nor had he returned the money to the plaintiff. The defendant cravedoyer of the writing and pleaded in bar of the action "that he did well and truly buy tobacco with the said one hundred dollars." This was the only plea; issue was joined upon it, and a verdict was found for the

NASHVILLE,
December, 1839.Bledsoe
v
Chouning.

plaintiff. The defendant moved in arrest of judgment, which motion was overruled by the court, and judgment rendered for the plaintiff; to reverse which the defendant below has prosecuted his writ of error to this court. And here the error insisted on in argument is, that the issue joined between the parties was an immaterial one, and that final judgment should not have been rendered upon the finding of the jury, but that a repleader should have been awarded. It is not necessary to enquire whether, as the plea is in the words of the written undertaking, it is not to be understood as averring the performance of that which the sense and meaning of the undertaking imposed upon the defendant as a duty. Let it be taken, as insisted on by the defendant below, that his plea is bad and the issue immaterial; it is well settled that a repleader is not grantable in favor of the person who made the first fault in pleading. See Tidd's Prac. 834: see also *Staple vs. Haydon*, 2 Salk. 569: 6 Mod. 1: 2 Ld. Ray. 922: 2 Saun. Rep. 319, note 6. In the case of *Bennet vs. Holbeck*, 2 Saun. 319, where it was ruled that the issue was aided by the finding, it is said "that if the issue had not been so aided the plaintiff would have been entitled to judgment, because his declaration was not answered; for as the plaintiff's declaration must have all essentials necessary to support the action, so the defendant's plea must be issuably good; and if the gist of the plea is bad it cannot be cured by a verdict found for the defendant, but if it be found for the plaintiff, he shall have judgment either for the badness or falsehood of the plea." If in this case then the plea were essentially bad, as the party pleading it insists it is, and also found by the jury not to be true, the defendant under such circumstances was not entitled to the award of a repleader in his favor, but the plaintiff was entitled to judgment, which having been rendered in his favor, is now here affirmed.

NASHVILLE,
December, 1839.

PARRISH *et al.* vs. GRAY.

Parrish
v
Gray.

A. F. M'Kinney, the security of Polson in a bond executed to Gray, gave Gray a notice in the following words: "I wish you to collect the debt off of Polson wherein I am security. 1st February, 1838. A. F. M'Kinney:" Held that this was not such a requisition "forthwith to put the bond in suit," as would discharge M'Kinney in the event that Gray did not put the bond in suit.

William Gray instituted an action of debt in the circuit court of Williamson county on the 19th day of April, 1838, against Joseph D. Polson, Charles D. Parrish, Alexander F. M'Kinney and Benjamin F. Tappan, upon a bill single. Polson was the principal and the others were his securities. Polson pleaded "payment and set off," and a verdict and judgment were rendered against him, from which there was no appeal. The other defendants pleaded separate pleas, each resulting in an issue upon the question whether the defendants had given the plaintiff such notice to institute suit upon the bond as is required by the act of 1801 to discharge him therefrom. At the March term, 1839, these issues were submitted to a jury. The plaintiff introduced and read to the jury an obligation for four hundred and fifty dollars, executed by Joseph D. Polson, Charles D. Parrish, Alexander F. M'Kinney and Benjamin S. Tappan, due the 25th of January, 1839.

The defendants proved that on the 1st day of February, 1838, A. F. M'Kinney sent a notice to the plaintiff in the following words:

"Mr. Wm. Gray: I wish you to collect the debt off of Polson wherein I am security.

"1st February, 1838.

A. F. M'KINNEY."

No person knew of the delivery of this notice but the witness who carried it. He told plaintiff he had better go and see Polson as Polson had just won five hundred dollars on a horse race, to which plaintiff replied that it was hardly worth while to see Polson on the subject. Polson was insolvent. Defendants further proved that plaintiff told the witness in October, 1838, that M'Kinney had given him notice to collect the debt or bring suit on the obligation; witness could not recollect the words used; and that he, plaintiff, went to town

for the purpose of instituting suit in due time, but that he was prevented from so doing by an agreement on the part of Tappan to pay the money or confess judgment on the obligation at March term, 1838, if plaintiff would not sue on it. Defendants proved by another witness that plaintiff stated that M'Kinney had given him notice to bring suit on the obligation now in suit. This was just before March term, 1838. At the March term, 1838, Tappan declined paying the money or confessing judgment, in consequence of a determination on the part of his securities to resist judgments over against them, and in consequence of a discovery of the notice given by M'Kinney. The court charged the jury that the notice necessary to discharge a security from his obligation to pay the debts of his principal must be such as the statute requires; that if the words used in the notice be ambiguous, they are to be taken most strongly against the party giving the notice; and if M'Kinney intended, by the notice given in this case, to instruct the plaintiff to make a private application to Polson for the money he had won at the horse race, it would not be such a notice as the statute required.

NASHVILLE,
December, 1839.

Parrish
v
Gray.

The jury found a verdict against all the defendants for four hundred and fifty dollars debt, and thirty-two dollars damages. A motion for a new trial was made and overruled, and judgment rendered in accordance with the verdict; from which there was an appeal in the nature of a writ of error to the supreme court.

Alexander, Campbell and Marshall, for plaintiffs in error.

R. C. Foster, for defendant.

GREEN, J. delivered the opinion of the court.

This action is founded upon a bill single, executed by Joseph D. Polson, O. D. Parrish, Alexander F. M'Kinney and B. S. Tappan to the plaintiff, for four hundred and fifty dollars. Parrish, M'Kinney and Tappan were the securities of their co-defendant, Polson, and the only question in the case is, whether the plaintiff received notice to sue from the securities, or either of them, and neglected for more than thirty

NASHVILLE,
December, 1838.

Boyers
v
Pratt.

days thereafter to bring suit, whereby they are discharged by the provisions of the act of 1801, ch. 18, sec. 1, (C. and Nich. 657.) The notice which was sent to the plaintiff by M'Kinney, one of the securities, is as follows: "Mr. Wm. Gray: I wish you to collect the debt off of Polson wherein I am security. 1st February, 1838. A. F. M'Kinney." The court told the jury that this was not such a notice as the statute requires.

We think the opinion of the circuit judge correct. The statute says it shall be lawful for any security to any bond, &c. to require, by notice in writing, of the creditor forthwith to put the bond, &c. in suit, and unless "the creditor so required to put such bond, &c." in suit, shall within thirty days thereafter commence an action on such bond, &c. he shall forfeit the right to demand of the security the amount due by such bond, &c."

The notice before us in this case does not require the creditor to put the bond in suit, but simply expresses a wish that he would "collect" the debt. That the request to collect is not a requisition to sue is evident; and a party who seeks to be released from his written voluntary obligation to pay money by the mere force of the statute in his favor, must show that he has complied with the statute on his part. This is not done in this case, and we therefore affirm the judgment.

BOYERS vs. PRATT.

If a party to a suit receive the word "replication" for a replication, it shall be held as a replication suitable to the defence made.

No man is bound to know the by-laws of an academy or to take notice of the existence of any laws but those that are public.

The court will not set aside the verdict of a jury in a civil action on the ground that the damages are excessive, unless they are "flagrantly outrageous and extravagant, evincing intemperance, passion, partiality or corruption, such damages as all mankind would at once pronounce unreasonable."

On the 14th day of May, 1838, E. P. Pratt instituted an action of trespass with force and arms, in the circuit court of

Sumner county, against Robert M. Boyers, for an assault and battery committed upon him in the streets of Gallatin on the 19th day of May, 1838, with a horsewhip. The declaration was in the usual form, and the defendant pleaded the plea of *son assault demesne*, upon which issue was taken. At the June term, 1839, the cause was tried, judge Rucks presiding. The jury rendered a verdict in favor of the plaintiff for the sum of fourteen hundred and sixty dollars damages. A motion was made for a new trial. The motion was overruled, judgment rendered, and the defendant obtained an appeal in the nature of a writ of error to the supreme court. The state of the pleadings and the facts of the case are more fully set forth in the opinion of the court.

NASHVILLE,
December, 1839.

Boyers
v
Pratt.

White, for plaintiff in error:

Guild, for defendant in error.

TURLEY, J. delivered the opinion of the court.

This is an action of trespass brought by the defendant in error to recover damages for an assault upon his person under the following circumstances: Boyers had a son of some twelve or fourteen years of age at school with Pratt. Upon a matter of disobedience Pratt chastised the child, and accidentally struck him a blow upon the eye, which inflamed it to an extent that excited the indignation of his parent. Boyers had an interview with Pratt at his counting room upon the subject; Pratt explained and apologised for the accident, but Boyers was not satisfied, and inflicted upon him personal chastisement for the offence. Pratt called the board of trustees together, and was acquitted of intentional wrong. Subsequently he met Boyers in the street and handed him a note, which in substance stated that inasmuch as he had taken the management of his son into his own hands, he would have nothing further to do with him, and would dismiss him from his school. Boyers, upon reading this note, threatened him with a cowhiding if its purports were persisted in. Pratt left him without explanation, and Boyers rushed into a store and enquired for a cowhide, was informed there was none,

NASHVILLE,
December, 1839.

Boyers
v
Pratt

seized a horsewhip and followed Pratt immediately, and inflicted upon him chastisement therewith to the extent of from ten to twenty-five lashes, he (Pratt) resisting. Boyers proved that by the by-laws of the school no pupil could be expelled but by order of the board of trustees; but it appears that these rules were adopted for the government of the school long before Pratt had taken charge of it, and that he was not aware of their existence. Boyers pleaded *son assault demesne*; to which there was "replication and issue" *in totidem verbis*, and no more. Upon the trial Boyers introduced proof as to the chastisement of the child in mitigation of damages; and Pratt introduced proof of the interview at the counting-house of Boyers, and the explanation and chastisement consequent thereon, to which Boyers objected as illegal, but which was overruled.

Under the charge of the court the jury returned the verdict which is now sought to be set aside for several reasons:

1st. Because it is said there is no issue, the words "replication and issue" being insufficient to tender one. As much as this court has reprobated this mode of pleading, yet it has always held that if a party to a suit will receive the name of a plea for the plea, it shall be considered as well pleaded; if he will receive the word replication for a replication, it shall be held as a replication suitable to the defence made. In this case defendant pleaded *son assault demesne*; the proper replication would have been *de injuria sua propria absque tali causa*, concluding to the country, and then a *similiter* would have closed the pleadings. We must consider the words "replication and issue" as equivalent to the same thing.

2d. It is said that the court erred in permitting testimony to be heard concerning the assault upon the plaintiff at the counting room of the defendant. We do not think so. The note which was handed by the plaintiff to the defendant, and which was introduced by the defendant as the immediate provocation for the assault, could not have been properly understood by the jury without hearing the whole transaction. The defendant seems to have felt this, and therefore introduced himself proof of the circumstances attending the chastisement of his child. After this he had no right to object

to this proof, introduced by the plaintiff. Indeed we think every thing from the beginning to the end of this affair is so intimately connected that it was necessary and proper for the jury to hear the whole to be enabled to come to a correct conclusion upon the subject.

NASHVILLE,
December, 1839.

Boyers
v
Fratt.

3d. It is said the judge erred in saying to the jury that the plaintiff was not to be affected by the by-laws of the academy unless he knew that they existed. The charge upon this point is correct. A man is not bound to take notice of the existence of any laws but those that are public, and this upon grounds of public necessity.

4th. It is said that the damages are enormous, and that a new trial ought to be granted for that cause. New trials are sometimes granted for this reason, but they are rare. It is never done unless, in the language of judges Thompson and Spencer in the case of *McConnell vs. Hampton*, 12 John. R. 236, "the damages are flagrantly outrageous and extravagant, evincing intemperance, passion, partiality or corruption, such as all mankind would at once pronounce unreasonable." This we do not think can be said of this verdict. Here there was a harmless, inoffensive young man of religious habits and a non-combatant, a stranger in a strange land, degraded by the infliction of the most ignominious punishment from the hands of a wealthy, influential and respectable citizen, and without any thing approaching to adequate cause. Who can begin to estimate, in dollars and cents, what would be an adequate compensation for such an injury? The man who could ought not to be entitled to a verdict from a jury if the same punishment were inflicted upon himself. But, independent of this consideration, the peace of society ought in cases of this kind always to be looked to, and damages given to such an extent as will deter persons from the commission of such offences. Bloodshed almost always follows them, and obviously would have done so in this case but for the quiet and peaceable disposition of the plaintiff. We cannot say, then, that these damages are excessive. The question is one purely of fact, and we do not think that the jury have abused their trust. The judgment of the circuit court will therefore be affirmed.

NASHVILLE,
December, 1839.

MABRY, *et al.* vs. TARVER.

Mabry
v
Tarver.

The bond executed by the sheriff for the collection and payment of the State and county taxes, in conformity with the act of the assembly passed in 1835, ch. 15, sec. 1 and 2, should embrace the entire term of the sheriff, to wit, two years.

The bond was made with a penalty of ten thousand dollars. This sum is less than double the amount of the aggregate of the State and county taxes assessed and to be collected for the year 1838 and 1839. This is no valid objection why judgment should not be rendered by motion against the defendant and his securities for the amount of his defalcation.

The legislature have the power, under the constitution, to prohibit in general the keeping of stallions and jacks for purposes of profit in the propagation of stock, and also to prohibit in general the exhibition of shows, and yet concede these privileges to all those who shall apply for a license and pay for the privilege the amount specified by law.

The facts of the case are as follows: Thibbets, the trustee of Wilson county, made a motion against Benjamin S. Mabry and his securities, in the circuit court of Wilson county, on the 17th day of October, 1839, A. J. Marchbanks presiding, for a failure on the part of said Mabry to pay over, according to law, the balances of the taxes by him collected as sheriff of Wilson county for the several years of 1838 and 1839.

The trustee produced the following bond to the court: "State of Tennessee, Wilson county. Know all men by these presents, that we, B. S. Mabry, &c. &c. &c., all of the State and county aforesaid, are held and firmly bound unto Silas Tarver, chairman of the county court of said county for the time being, and his successors in office, for the use of said county, in the sum of ten thousand dollars, to the payment of which we bind ourselves well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally and firmly by these presents, sealed with our seals and dated the 5th day of March, 1838. The conditions of the above obligation are, that whereas the above bound B. S. Mabry has been duly and constitutionally elected sheriff and collector of public taxes for said county of Wilson for two years from the first Saturday in March, 1838: Now, if the said Mabry shall well

and truly collect all county taxes within said county which by law he ought, and well and truly account for and pay over all taxes by him collected, or which ought to be collected, to the county trustee of said county on the 1st days of October in the years 1838 and 1839 respectively, then the above obligation to be void, otherwise to remain in full force and virtue."

NASHVILLE,
December, 1839.

Mabry
v
Tarver.

The trustee produced proof of the appointment of commissioners, according to law, to take the lists of polls and taxable property for the years 1838 and 1839 respectively, of the return duly of the lists, and of the levying of the taxes by a competent court. It was admitted by the defendants that the aggregate amount of assessed taxes for the county in the year 1838 was three thousand seven hundred and twenty-three dollars, and for the year 1839 two thousand three hundred and seventy-seven dollars twelve and a half cents; and that these sums had been reduced by payments, leaving a balance unpaid for the year 1838 of five hundred and twenty-three dollars, and for the year 1839 of one thousand two hundred and thirty-four dollars forty-nine cents in the hands of the sheriff.

The clerk of the county court of Wilson county testified that he made out certified copies of the tax lists for the years 1838 and 1839, and that he delivered a certified copy of the tax list of 1838 to the sheriff, Mabry, before the time required by law had expired. He also testified, with regard to the tax lists of 1839, that a transcript thereof was made out in due time, and that the sheriff was notified of the fact of their readiness. It also appeared that a portion of the monies in the hands of the sheriff, for the recovery of which this motion was made, was the sums assessed by the county court for the license of keeping jacks and stallions and for the exhibition of shows.

Upon these facts the circuit court rendered judgment against the said Mabry and his securities upon their penal bond for the amount of the deficiencies for the years 1838 and 1839, amounting in all, together with twelve and a half per centum damages, to the sum of one thousand nine hundred and seventy-seven dollars one and a half cents,

NASHVILLE,
December, 1839.

Mabry
v
Tarver.

From this judgment the defendants obtained an appeal in the nature of a writ of error to the supreme court at Nashville.

Hall, for plaintiff in error, contended: 1. That the tax upon the keeping stallions and jacks, and upon the exhibition of shows, was unconstitutional, and being illegally collected the sheriff rightfully refused the payment of it to the county of Wilson.

2. That the statute requires that the bond should be taken in double the amount of the assessed taxes. This was less than double the amount assessed. No motion will lie upon a statutory bond unless the statute requirements in regard thereto are strictly complied with. 4 Yer. 155: 5 Yer. 297.

3. That the bond in this case was taken for two years, and that there should, by a fair construction of the statute of 1835, ch. 15, have been for each year a separate bond.

Attorney General and *R. L. Caruthers*, for the defendant in error, cited act of 1835, ch. 15 sec. 1 and 2: *Kincannon* vs. *Carroll*, 9 Yer. 89.

REESE, J. delivered the opinion of the court.

This was a motion in the circuit court for Wilson county against the plaintiff in error, Mabry, and his securities, for balances of the county taxes of that county for the years 1838 and 1839, not paid over by him to the county trustee. Judgment was rendered against the defendants below, to reverse which they have prosecuted their writ of error to this court. And here it is insisted: 1. That the bond given by the collector and his securities is not in conformity with the requisitions of the statute 1835, ch. 15, because, first, it embraces two years, 1838 and 1839, when it is insisted that there should have been a separate bond for each year; and second, because the bond is taken in the penalty of ten thousand dollars, which is less than double the amount of the aggregate of the county taxes assessed and to be collected for these two years. As to the first ground of objection, it

NASHVILLE,
December, 1839.Mabry
v
Tarver.

may be remarked, that the statute does not require in terms that separate bonds should be taken, but requires only that the bond should be conditioned for the payment of the taxes, in each and every year, he may collect, on the first Monday in October; that the term of office for a sheriff and collector has always been in our State two years, and the bond has uniformly embraced the entire term. And if it had been the purpose of the legislature to have made so marked an innovation upon established usage as the requirement of an annual bond, it is difficult to suppose that they would not have so directed in terms. As to the second objection, that the penalty of the bond taken at ten thousand dollars is less than double the aggregate amount of the taxes to be collected for the two years, which the record before us shows to be so, we are of opinion that it ought not to have the effect of protecting the plaintiffs from a judgment on motion. We are aware of the principles settled in the cases reported, 4 Yer. Rep. 155: 5 Yer. Rep. 297, and the other cases referred to in the argument, and of their apparent analogy to the case before us. We are not disposed to question or in the least degree to shake their authority. Those are all cases in which the statute gives a specific penalty in *numero*, and where the liability of the principal might be much beyond that penalty. Here the liability is confined to the taxes to be collected, and the penalty of the bond prescribed by the statute is not a specific sum; it is to be double the amount of the taxes to be collected; it is a sum to be fixed by estimate and computation; and to hold, that if, in the estimated amount of the taxes when multiplied by two, any, the least error, should intervene, it should have the effect to defeat the motion given by the statute itself, upon the ground that the bond ceased to be statutory, would be utterly to obstruct the fiscal policy of the legislature set forth in the act. If we are correct in supposing that the bond may be taken to cover two years, it would be almost impossible to attain entire accuracy in fixing the precise amount of the penalty so as to make it double the amount of the taxes. This difficulty, inherent in the provisions of the statute itself, imposes upon us the duty of exempting

NASHVILLE,
December, 1839.

Mabry
v
Tarver.

a case like the present arising under it from the scope of the principles maintained in the cases referred to.

2. As a portion of the taxes due in the case before us was from the keepers of stallions and jacks, and the exhibitors of shows, it is contended that so much is unconstitutional. The act of 1835, ch. 15, sec. 4, prohibits in general the keeping of those animals for profit in the propagation of stock, and the exhibitions of shows, but concedes the privilege of doing so to all those who shall apply for a license and pay for the privilege the amount specified in the act. The constitution in express terms confers upon the legislature the power to tax privileges. But, it is contended that the avocations in question are not in themselves, and in their nature, privileges. They are not so indeed, unless prohibited in general by the law; but when so prohibited, the license or permission to pursue them becomes a privilege, and the subject of the taxing power of the legislature. The 7th section of the 11th article, which prohibits the legislature from granting privileges, immunities or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law, shows the sense in which the convention use the term. It is the license or permission, upon the specified terms, to do that which in general is prohibited. Such license or permission, as has been said, becomes a privilege and the subject of taxation. But it is said, that to concede to the legislature unlimited power to prohibit particular pursuits and avocations in themselves indifferent or useful, and then to license them on specified terms, and tax the privilege, might make the pursuit of farming itself a subject of taxation. The danger is somewhat remote of the indiscreet exercise of such a power, but if it were to occur the corrective would have to be applied by the people themselves in the exercise of their elective franchise.

Let the judgment be affirmed.

**MARSHALL and HARTSHORN vs. THE NASHVILLE MARINE
AND FIRE INSURANCE COMPANY.**

NASHVILLE,
December, 1839.

Marshall
v
Insurance Co.

Where goods are insured against "thieves," the insurers are not liable for loss by simple theft but for loss by robbery only.

Joseph H. Marshall and Jacob Hartshorn, partners in trade, instituted an action of covenant, on the 10th day of April, 1839, in the circuit court of Davidson county, on a policy of insurance against the president and directors of the Nashville Marine and Fire Insurance Company. It appears by the declaration of the plaintiffs, that they were possessed of certain packages of goods, wares and merchandise in the city of New York valued at twenty-five thousand dollars, and that they procured them to be insured by the Nashville Marine and Fire Insurance Company to be safely delivered at Nashville. The packages were insured against the dangers of rivers, seas, men of war, fires, enemies, pirates, rovers, thieves, &c. "And the plaintiffs further aver, that on the 25th day of August, 1838, the said goods, wares and merchandise, left New York on their said voyage, *via* Pittsburgh, for Nashville, and before their arrival at Nashville aforesaid, to wit, on the — day of — 18—, five of the packages of said goods, wares and merchandise, worth about two hundred and thirty-eight dollars and sixty-three cents, were stolen by thieves from on board the boats employed in the transportation of said goods, by persons unconnected with said boats, whereby the goods, wares and merchandise, of the value aforesaid, were wholly lost to the said plaintiffs, and never did arrive at Nashville."

The defendant demurred to the declaration, and the plaintiffs joining in demurrer, the court at September term, 1839, sustained the demurrer, and gave judgment in favor of the defendant. The plaintiffs appealed in error to the supreme court.

E. H. Ewing, for plaintiffs.

Meigs, for defendant.

NASHVILLE,
December, 1839.

TURLEY, J. delivered the opinion of the court.

Marshall
v
Insurance Co.

This action is brought to recover damages upon a policy of insurance, effected by the plaintiffs with the defendant, for a loss sustained upon cargo by reason of theft. The risks taken by the insurance company, as expressed in the policy; are of the rivers, seas, men of war, fires, enemies, pirates, rovers, thieves, &c. The declaration avers that the goods lost, "were stolen by the thieves from on board the boat employed in the transportation of the goods insured, and by persons unconnected with said boats." To this declaration there is a demurrer; and the only question is, whether this averment is good and sufficient in law to charge the insurance company. The question is resolved into what shall be held to be the meaning of the word thieves, as contained in the policy of insurance. On the one hand it is contended, that the theft insured against is that which is accompanied by violence, more strongly expressed by the Latin word *latrocinium*, robbery; and on the other hand, that it is a simple larceny, expressed by the Latin word *furtum*, a theft committed quietly and secretly.

This is a question at the present day not to be reasoned about, as we think it depends entirely upon authority. Chancellor Kent, in the 3d volume of his Commentaries, says: "The enumerated perils of the sea, pirates, rovers, thieves, include the wrongful and violent acts of individuals, whether in the open character of felons or in the character of a mob or as a mutinous crew or the plunderers of ship-wrecked goods on shore; the theft that is insured against by name, means that which is accompanied by violence (*latrocinium*) and not simple theft." To the same effect is Philip on Insurance, p. 258; he says: "There is a distinction between plunder committed by a superior force and simple larceny without violence. In most cases the insurers are not liable for losses of this latter description, because such losses might be prevented by proper vigilance. It is probably for the purpose of adapting the policy to this distinction that some underwriters have introduced the words assailing thieves instead of thieves and rovers; but these latter

words do not in general cover losses by theft, except those which are accompanied by violence or where the theft is committed under circumstances in which it could not be prevented." See also Park on Insurance, 23: Marshall on Insurance, 156, *et seq.* These authorities fully establish the principle contended for by the insurance company, to wit, that it is *latrocinium* and not *furtum* that is insured against under the word "thieves." In opposition thereto there has been but one authority produced, and that is a dictum of Chancellor Walworth in the case of the *Atlantic Insurance Company vs. Storow and Boyd*, 5 Paige's Rep. 285. The question did not arise in the case, and his opinion is *obiter* and unsupported by authority, and therefore of but little weight against the names produced on the other hand. But it is said that all the authorities produced are dicta, commencing in error and continuing so. To this we have to say, that it is impossible for us at this day to investigate with any thing like accuracy this branch of learning, because we have not the sources from whence it originated, and if we had could not feel ourselves authorized to draw different deductions therefrom, in the absence of adjudicated cases, from those which have been drawn by the able commentators above referred to. So far as we can see, the commercial world has been contented to be governed by them, and so must we.

The judgment of the circuit court will be therefore affirmed.

NASHVILLE,
December, 1839.

Marshall
v
Insurance Co.

NASHVILLE,
December, 1839.

ELIJAH, a slave, vs. THE STATE.

Elijah
v
The State.

A master is a competent witness for or against his slave on his trial on an indictment for an assault and battery with intent to commit murder in the first degree.

On the trial of a slave for an assault with intent to commit murder in the first degree the court have the power to discharge the jury and enter a mis-trial, with the consent of such slave and the counsel employed by his master to defend him. It is not necessary that it should appear that the master consented to such mis-trial.

At a circuit court held for the county of Smith, in the town of Carthage, Judge Caruthers presiding, the grand jury, on the 16th day of April, 1839, returned a true bill against Elijah, a slave, the property of Elijah Carmon, for an assault and battery with an intent to commit murder in the first degree, by killing maliciously and premeditatedly David C. Puryer. To this indictment the defendant pleaded not guilty, with the concurrence of his master, who defended the prosecution, and issue was joined upon this plea. On Monday, the 22d April, the trial commenced. On Tuesday, the 23d, the testimony and arguments of counsel were heard. On the 24th, the jury not being able to agree, were put under the custody of an officer. On Thursday, the 25th April, 1839, the jury was discharged and a mis-trial entered. An entry was made on the records of the court in the following terms: "Thursday, 25th of April, 1839, came again the attorney general for the State and the attorney of the said Elijah Carmon, the owner of said slave, who defends this prosecution, and the said defendant was again brought to the bar of the court in custody of the sheriff, and then came also the same jury, elected, tried and sworn in this case, when the jurors declared that they had not agreed upon their verdict and that they could not agree upon their verdict. Whereupon, by consent of the attorney general and the said defendant and the attorney who defends for said defendant, and with the assent of the court, the jurors aforesaid are discharged and a mis-trial entered." At the August term, 1839, the cause was continued by the State. At the September term, 1839, the honorable Alvah Cullom, a special judge appointed by reason of

the indisposition of the regular judge, presiding, the cause was tried and the defendant convicted as charged in the bill of indictment. A motion was made for a new trial. This motion was overruled, and the said Elijah sentenced to be hanged on the 1st day of January, 1840, in the town of Carthage. From this judgment an appeal in the nature of a writ of error was prayed and obtained to the next term of the supreme court of the State of Tennessee at Nashville.

NASHVILLE,
December, 1839.
Elijah
v
The State.

The bill of exceptions contains the following entry: "The defendant, by his counsel, offered as a witness on his behalf Elijah Carmon, the owner of said slave Elijah, but he was rejected by the court as an incompetent witness; to which opinion of the court, in the rejection of said witness, the defendant by his counsel excepts."

R. J. Meigs, for the prisoner.

Attorney General, for the State.

REESE, J. delivered the opinion of the court.

This is an indictment for an assault with intent to commit murder in the first degree, an offence which, in a slave, is capital by the provisions of our statute. He was convicted in the circuit court, and has prosecuted this appeal in error to reverse the judgment. It is argued by his counsel that, at the term previous to that when the verdict and judgment were given, a mis-trial was improperly entered; that the record shows only that the defendant and his counsel consented to the discharge of the jury when the consent of the master should also have been shown, but the counsel was counsel for the master and the slave, and the consent of the defendant and his counsel are well enough, and bring the case within the principle stated by this court in the case of *Mahala vs. The State*, 10 Yer. But it is said the circuit court erred in rejecting the master of the slave, when offered as a witness in his favor, on the ground of his incompetency from pecuniary interest. And of this opinion are the court. A father has an interest, which may be valuable, in the services of his minor son, yet it is not questioned that he can be a witness

NASHVILLE,
December, 1839.

Elijah
v
The State.

for or against him on a charge affecting his life. A master may have a pecuniary interest in the future labor and services of his apprentice, much exceeding, it may be, in a few pursuits, the entire value of this slave; yet, perhaps, it has never occurred to any one that the master is incompetent to testify on behalf of the apprentice in a matter affecting his life. The relation of master and slave is indeed different; but in a case like this the law, upon high grounds of public policy, pretermits, for a moment, that relation, takes the slave out of the hands of his master, forgets his claims and rights of property, treats the slave as a rational and intelligent human being, responsible to moral, social and municipal duties and obligations, and gives him the benefit of all the forms of trial which jealousy of power and love of liberty have induced the freeman to throw around himself for his own protection. If then the master know any fact tending to save the life of the slave, shall society, who have taken from him the slave for the purpose of trial, say to him, not that you are master and we will weigh your credit, but you are master and shall not speak at all? On grounds of public policy, of common humanity, of absolute necessity, the master must be held to be competent as a witness for or against the slave. Society will not allow him to say, I have a pecuniary interest in the event of the trial, my testimony may subject me to a loss, and I will not testify against my slave. On the other hand, humanity forbids that society should say, you have such interest and shall not be heard to prove a fact in his favor. In cases where one slave may kill another, the master may often be the only person cognizant of his guilt, or the only person who can establish his innocence. Shall he refuse to speak in the one case lest he incur a loss, shall his lips be sealed in the other because he has an interest? Public policy and common humanity dictate the necessity of so treating this relation that the guilty should not escape punishment, or the innocent be made to suffer. In England, where rewards have been offered for conviction by the public, the witness entitled to such rewards have been held competent by the unanimous opinion of the twelve judges, and this against the life of an individual, on

grounds of public policy. The case before the court seems to have occurred in New Jersey, (1 Sou. Rep., *Aaron vs. The State*.) in the case of a negro servant or slave for a term of years, and the master was held to be competent. Except that case, there seems to be no precedent. But upon principle, we have no doubt that the objection must be held to extend to the credit not to the competency of the master.

The verdict will therefore be set aside, and the judgment reversed, and the prisoner remanded to be tried again.

NASHVILLE.
December, 1839.

M'Adoo
v
Sublett.

M'ADOO vs. SUBLETT.

Where there are contradictory calls, the one for an established line and the other for course: Held that the call for the line will control the call for course.

Where there were two lines known as Montfort's line, and on one of those lines stood "M'Culloch's corner, a red oak:" Held that in a deed calling for Montfort's line at M'Culloch's corner, a red oak, these words "M'Culloch's corner, a red oak," designates which of the lines was meant.

Where a party is misled by the statement of another in regard to the boundary of his land, and enters into an agreement relinquishing his rights upon the belief of such statements: Held that the court will set aside such agreement, whether produced by mistake or fraud.

This bill was filed by Samuel M'Adoo on the 25th of September, 1834, in the circuit court of Rutherford, and subsequently transferred, under the provisions of the act of 1835, ch. 41, to the chancery court at that place, against the defendant, Sublett. The prayer of the bill was, that an agreement entered into between the parties for the purpose of settling a question of disputed boundary should be set aside, the parties restored to their original rights, and complainant be quieted in his title. The agreement divided the disputed land between Sublett and M'Adoo. It was registered, and Sublett took possession of the land in dispute by virtue of it. It appears by the testimony that the State of North Carolina granted to Joseph Montfort a tract of three thousand eight hundred and forty acres of land. On the 18th and 19th April, 1816, Benjamin M'Cul-

NASHVILLE,
December, 1839.

M'Adoo
v
Sublett.

loch and one Gordon caused the grant to be processioned by Brashear, a surveyor of Rutherford county, who made the line of the grant to run somewhat north of what was understood to be the original line. Gordon had this line, so run, registered. It does not appear that M'Culloch claimed his boundaries by virtue of this processioning.

On the 29th July, 1828, Gordon sold to Sublett from six hundred and forty-two to six hundred and seventy acres of land, lying on the north boundary of Montfort's tract, and described in Gordon's deed to Sublett as beginning at M'Culloch's corner, a red oak, running thence west with the north boundary line of Montfort's original tract four hundred and ninety-two poles to a hickory, &c. &c. When Gordon sold to Sublett he showed him the processionary line as his line. "M'Culloch's corner, a red oak," stood on what was understood to be the original line of the Montfort grant, and if the lines of Sublett's tract conformed to the calls of his deed they would not cover any of the land claimed by M'Adoo, and which had been surrendered by him by virtue of the agreement. If run by and with the processionary line of Brashear, it would cover some thirty acres of land in the possession of M'Adoo for a long term of years and claimed by him. M'Adoo claimed under Donelson, the grantee of the State of North N Carolina, who owned the tract adjoining Montfort's on the north, and his deed called to begin at "Benjamin M'Culloch's corner, a red oak," and "to run thence west with Montfort's north boundary line," &c. Sublett took possession of the land, in accordance with the processionary line, and a controversy arose, and thereupon a survey was attempted in the presence of the parties. Sublett stated to M'Adoo that if the line was run in pursuance of the calls of his deed it would include the land which he claimed. M'Adoo did not read the deed, nor does it appear that he knew the truth in regard to the calls of Sublett's deed. Upon the statement made by Sublett, M'Adoo, by the advice of his neighbors, agreed to divide the disputed territory, which was done accordingly, and an agreement entered into to that effect. This cause was argued at the August term, 1838, before chancellor Bramlett, and the bill

dismissed. The decree, however, was omitted to be entered, and at the following term the decree *nunc pro tunc* was entered, as follows:

NASHVILLE,
December, 1839.

M'Adoo
v
Sublett.

"Be it remembered, that this cause came on to be heard on the — day of August, 1838, before the honorable Lunsford M. Bramlett, chancellor, and upon the bill, answer, replication, exhibits and proof; and the court being of the opinion that the charges on the bill, of fraud and contrivance in procuring the compromise, and the execution of the written agreement between the parties, which the bill prays may be set aside, are denied in the answer and not sustained by the proof; and the court being further of the opinion, that there was no surprise in the obtaining from said complainant said agreement; it is therefore ordered, adjudged and decreed, that complainant's bill be dismissed, and that he pay the costs of this suit," &c.

From this decree the complainant prosecuted his appeal to the supreme court.

Ready, for the complainant. The leading question to be decided in this case is, did Sublett procure the written agreement from M'Adoo to divide the land in controversy by false and fraudulent representations? He admits that he stated to M'Adoo that his deed covered all the land he had caused to be run out for himself, and this fact is abundantly proven by numerous witnesses; but he alleges that he read the calls of his deed to complainant, and that complainant examined the deed. This allegation of the answer is clearly disproven. On the contrary, it is proven that the deed was neither read nor examined during the controversy on the premises. This deed itself shows that its calls do not cover the land in controversy; and if the fact be as stated by Sublett in his answer, and as stated by one of the witnesses, that Gordon, at the time of the sale to Sublett, showed Sublett, as his corner, a rock, which is described as being some eighteen or twenty poles north of M'Culloch's red oak corner, it is most manifest, by the subsequent execution of the deed, that whatever land he may have showed Sublett, and wherever he may have represented his line as running,

NASHVILLE,
December, 1839.

M'Adoo
v
Sublett.

that he did not intend to convey to him one foot north of the red oak. This course is consistent with the course of a scrupulous man not desirous of selling land with doubtful title. The red oak is a well known and long established corner tree, and was no doubt inserted in the deed as designating what were the boundaries of the land sold. The deed, then, does not cover the land, and was not intended to cover it; and as Sublett represented that the calls of his deed did cover it, and as complainant did not examine the deed, it is manifest that he was misled by the assertions of the defendant. If the complainant was misinformed and misled as to a material fact a court of equity will afford relief. 1 Story's Equity, 155: *Garland vs. The Bank of Salem*, 9 Mass. 408. And if both parties were innocently mistaken as to the fact of what land the calls of Sublett's deed did cover, and acting upon this mistaken view of the fact, M'Adoo did sign the agreement, a court of equity will interpose and afford relief by setting aside the agreement and restoring M'Adoo to his original situation. But the testimony in this case makes it much stronger than one of mere mistake of one or of both parties. Sublett knew his deed did not cover the land surrendered by M'Adoo, and his intention to defraud is clearly established by the proof; and for this fraud the agreement must be declared void, and the parties restored to their rights. The complainant should be quieted in his title by a decree of this court.

Meigs, for defendant. 1. Sublett is guilty of no misrepresentation, because his deed calls for the north boundary of Montfort's tract; and though it should even be true that the tree called for stands south of that boundary, still he can claim to it, because a call for an old line is a controlling call.

2. But if it should appear, which is by no means admitted, that he did misrepresent this fact, still the complainant is not entitled to the relief sought. Sublett's deed was on record, and was as accessible to the complainant as to the defendant; so that whether it covered the land in controversy was a question equally open to the investigation of both, and equally within the competency of their knowledge. If it did not

cover it, inasmuch as there was no pretence that Sublett had had seven years possession, there was no matter of dispute between them; but to be relieved in equity against a misrepresentation, it must not only be of something material, but it must be of something in regard to which the one party places a known confidence and trust in the other. It must not be a mere matter of opinion, equally open to both parties for examination and enquiry, and where neither party is presumed to trust the other but to rely on his own judgment. 2 Story's Eq., sec. 192-197: *Laidlow vs. Organ*, 2 Wheat. 178: 4 Cond. Rep. 79.

NASHVILLE,
December, 1839.

M'Adoo
v
Sublett.

GREEN, J. delivered the opinion of the court.

The bill charges that the complainant owns six hundred and seventy-one acres of land in Rutherford county defined by marked lines, and that he has been in possession of the same for sixteen years, under a deed from John Donelson, the grantee; that his deed calls to begin at Benjamin M'Culloch's corner, a red oak, on Joseph L. Montfort's north boundary line, near Bradley's creek, on the north side; thence north one hundred and nineteen poles, &c. The south-west corner of the tract called for in the deed is described as a locust and iron-wood on Joseph Montfort's north boundary line; thence along the line east two hundred and seventy-eight poles to the beginning. The bill alleges that Sublett, the defendant, who owns the land on his south boundary line, in March, 1834, proceeded to run out his tract which he had purchased from James Gordon, being part of the Montfort tract. In running the north boundary of his tract, Sublett run over about twenty poles on complainant's tract, taking in thirty acres or upwards of his land. The bill charges that Sublett declared he was running according to the calls of his deed, and insisted that all the land included in the lines which he was running belonged to him, and threatened to sue complainant if he did not surrender the possession to him. Sublett did not show his deed to complainant, but during some of the interviews he took out a paper which he said was his deed, and holding it in his hands, read a part

NASHVILLE,
December, 1839.

M'Adoo
v
Sublett.

of it; but complainant charges that he did not read a description of the land, or otherwise, did not read it correctly. Complainant had confidence in Sublett's veracity, and did not suspect any misrepresentations as to the calls of the deed. Sublett declared he would sue if complainant did not surrender the land; expressed regret at having a law suit with a neighbor; and finally proposed that they should divide the land equally between them. Complainant's neighbors, believing Sublett's declarations, advised him to accede to this proposition, which he thereupon agreed to do. A dividing line was accordingly run, giving to each party half the disputed land, of which the surveyor gave a certificate, which has been registered.

The bill charges that complainant has since discovered that Sublett's deed does not cover any part of the land which was claimed and held by complainant, and that Sublett's statement was untruly made, with a view to deceive and defraud him; that complainant's south boundary line, as described in his deed, is the identical line described in his deed as his north boundary line, and each deed calls to begin on the same corner, Benjamin M'Culloch's red oak. The bill prays that the agreement to divide the land may be set aside, and that each party may be placed in the situation in which he stood before said agreement was made. The answer admits that the defendant, in running out his land, run over as much as twenty poles on the land claimed by the complainant, and admits he told complainant that his deed covered all the land he was running out. He admits that his deed calls to begin at M'Culloch's red oak corner, and that a line run west from thence would not include the land in controversy; but alleges that Gordon, from whom he purchased, showed him, and intended to sell him to Montfort's line, as run and marked by Brashear in his processioning survey, and that he ought to go to Brashear's line by the nearest route from the red oak corner, and thence west with said processioning line. He admits that the red oak corner was called for by mistake, and that he ought not to be bound down by it. He denies all fraud, and insists that he read the calls of

his deed truly. He alleges that he has been in the possession of the land in dispute ever since he purchased of Gordon, and that Gordon had been in possession of it for ten or fifteen years; so that his title would be better than complainant's independent of the compromise.

NASHVILLE,
December, 1839.

M'Adoo
v
Sublett.

From the evidence it appears that there were two lines, twenty poles from each other, that had been run and marked as Montfort's north boundary. M'Culloch's red oak corner stood in the southmost end, and the other, twenty poles north of this, was called Brashear's processioning line. Those who held under Montfort's grant had contended for Brashear's line, and those who held under Donelson insisted that the southmost line, in which M'Culloch's corner stood, was the true one. About the time Sublett's deed was made a majority of those acquainted with the boundary were of opinion the southmost line was the true one. The answer states that "M'Culloch had become willing to hold his tract in the Montfort grant by boundaries further south than he had formerly done." Gordon too, from whom defendant purchased, had relinquished possession of part of the land between the two lines, which he had formerly held.

With these facts in view, there is no difficulty in determining what land is covered by the deed from Gordon to the defendant. It calls to begin "on a red oak, M'Culloch's corner, running thence west with the north boundary line of Montfort's original tract four hundred and ninety-two poles to a hickory, elm and red oak, being Montfort's north-west corner; thence south," &c. If there had been but one line known and claimed as being Montfort's north boundary, the call for such old line would have been a controlling call; and although the corner called for as the beginning might be south of that line, the defendant would have been entitled to go to such old line from his corner, and thence along it, as called for in the deed. But here there are two lines which have been designated as the "north boundary of Montfort's original tract;" and the southmost one, to say the least of it, was as well known by that designation as the other. In this southmost line, it is admitted, stands "M'Culloch's red oak

NASHVILLE,
December, 1839.

M'Adoo
v
Sublett.

corner." When, therefore, Gordon, in his deed to defendant, calls for M'Culloch's red oak corner, and running thence west with Montfort's line, every word of the call may be complied with. If there were no such line from the red oak west, then the call for west and the call for Montfort's line being contradictory calls the call for the line would control the call for the course west. But here the plain sense of the call is, for the line known as Montfort's north boundary, in which the corner called for stands. We think, therefore, most clearly, that Sublett's deed does not cover any of the land north of M'Culloch's corner. We do not undertake to decide which of the disputed lines is the true one. For the present purpose, it is wholly unnecessary. If the dispute between the present parties had depended upon that question, it would have been a very proper subject for a compromise.

The next question is, what principles of law are applicable to these facts? That M'Adoo made the compromise under a mistake of the facts there is no doubt; whether Sublett mis-read the deed or not, the manner in which he did read it, together with his survey and claim of the land and threat to sue for it, unquestionably impressed upon M'Adoo the conviction that his deed covered the land in dispute, and that the old controversy about the line was to be revived. Under the influence of this belief, produced by his mistake as to the boundaries described in the deed, he made the compromise in question. This being the case, he is entitled to be relieved from the contract, and to stand as though it had never been made. Even if the mistake had been mutual, if Sublett had been ignorant of the existence of the southmost line, and having been shown Brashear's line by Gordon, believed it to be the line called for in the deed, still a contract made under such mutual mistake ought to be set aside. 1 Story's Eq., sec. 142, *et seq.* It is not necessary that we should discuss the question of fraud relied on by the complainant, inasmuch as the case may be disposed of on the ground above stated.

Let the decree be reversed, and decree that the compromise be set aside, and the parties be placed in the situation they

occupied before it was made. The defendant will pay all the costs. NASHVILLE,
December, 1839.

NOTE.—The court refused to quiet the title of complainant, as prayed for in the bill, but declared in the decree that “this decree is not to be set up to the prejudice of either party in any suit at law hereafter to be brought to settle the original rights to the land in controversy.”

Turbeville
v
Ryan.

TURBEVILLE and DARDEN vs. RYAN.

No authority is given a partner by the law merchant to bind his co-partner by deed; nor does the fact that the articles of co-partnership were under seal give him such authority merely from the circumstance of their being sealed; to have this effect a special power or authority must be contained in the articles.

Parol evidence is inadmissible to prove that one partner had authority under seal to bind this co-partner; nor would subsequent acts of ratification, or evidence of the manner in which he had acted in reference to other contracts of a similar character, establish the existence of such authority; its production cannot be dispensed with unless it is shown to have been lost or destroyed or otherwise beyond the power and control of those desiring to prove its contents.

On the 23d day of April, 1838, Thomas J. Ryan, who was the assignee of Reuben Bartlett, instituted an action of debt in the circuit court of Robertson county against David Darden and Miles J. Turbeville for the sum of two thousand three hundred and twelve dollars and seventy-four cents upon an obligation, which was in the following words:

“On or before the 25th day of December next we promise to pay to Reuben Bartlett, or order, twenty-three hundred and twelve dollars and seventy-four cents, for value received, this 29th day of May, 1837.

TURBEVILLE & DARDEN, [Seal.]”

On this obligation were the following endorsements: “Pay to Thomas J. Ryan. R. Bartlett.” “Received, 6th January, 1838, two hundred and fifty dollars.” “Received seventy-two dollars, January 6th, 1838.” “Received, April 2d, 1838, of Turbeville and Darden four hundred and ninety-six dollars and forty-four cents.”

The defendants pleaded to this action that they had paid the debt; and David Darden pleaded also that the obligation

NASHVILLE,
December, 1839.

Turbeville
v
Ryan.

above set forth was not his deed. Upon these pleas issues were taken and a verdict was rendered by a jury in favor of the plaintiff for the sum of fifteen hundred and ninety-five dollars and ninety-one cents. The defendants moved the court to set aside the verdict, but the motion was overruled and judgment rendered upon the verdict. They prayed and obtained an appeal in the nature of a writ of error to the supreme court.

The bill of exceptions exhibits the following facts:

The plaintiff executed and delivered to Reuben Bartlett, the obligee, a release of all claim against him by virtue of his endorsement of the obligation to the plaintiff, who then testified that the obligation in the pleadings mentioned, together with several others based upon the same consideration, was executed and delivered to him by Miles J. Turbeville, of the mercantile firm of Turbeville and Darden, and that the obligation was executed and delivered to him in consideration of a stock of goods sold and delivered to Turbeville and Darden, partners in merchandising. He also stated that Darden was not present when Turbeville executed this obligation, and did not, so far as witness knew, authorize Turbeville, by deed or other writing, to execute it. He further stated, that on the day of the execution of the obligation, or on the day after, Darden called upon the witness and told him that he was then ready to close the contract and give his notes for the amount. Witness then informed Darden that Turbeville had given the notes signed "Turbeville and Darden;" with this Darden expressed himself satisfied. Witness did not then show the obligation to Darden, or inform him that the instrument executed was a sealed instrument. Witness further stated that at the time Turbeville executed the above mentioned obligation to him he executed several instruments, signed "Turbeville and Darden," which were sealed. These were discharged by both the defendants paying monies upon them at different times during the partnership. This testimony was objected to, but the court admitted it to go to the jury.

The plaintiff then introduced Nicholas H. Ryan, who testified that the obligation set forth in the declaration was

placed in his hands for collection, and that he called upon Darden to pay "the note." Darden observed to him in reply that he knew he was bound to pay "the note," but that he and Turbeville had dissolved partnership, and that Turbeville was to pay the debts, and that he had taken security from him for the payment of the debts of Turbeville and Darden. Witness further stated that he did not show the obligation to Darden, and so far as he knew, Darden had never seen it. In speaking of the instrument as the evidence of debt he called it "a note." Witness did not inform him that it was a sealed instrument; he however described the instrument by the amount and the partners. The plaintiff read the obligation and the endorsements upon it. This was all the testimony. The charge of the honorable M. A. Martin, presiding judge, is in all its material parts set forth in the opinion of the court.

NASHVILLE,
December, 1839.

Turbeville
v
Ryan,

George Boyd, for the defendant in error, contended: 1. Partners are the mutual agents of each other in all things that concern the firm, (Story on Agency, 40,) but one partner has no power to execute a deed which will be binding upon the other partners unless he have express authority under seal so to do. Story on Agency, 115: Collier on Partnership, 256, 257: 7 Term Rep. 203.

2. Such bond is binding upon the partner who executes it, and extinguishes the simple contract debt of the firm. 1 Yerger, 26: 9 Massachusetts, 11: 7 Term Rep. 203.

3. Whenever an act of agency is required to be done in the name of the principal under seal, the authority to do the act must be under seal. Story on Agency, 50. And a subsequent parol ratification of such an act will not make it binding upon the principal. 9 Wen. 54: Johnson's Dig. 511.

4. When a party executes a deed under a power of attorney the power ought to be produced or its absence accounted for, the instrument being the best evidence of its own contents. 1 Esp. Ca. 89. Nor can the contents of a written instrument be proven by parol if the written instrument is in existence and can be produced. 1 Starkie; 436.

5. If the instrument is in the possession of the opposite party notice must be given to produce it, and then if it be not

NASHVILLE,
December, 1839.

Turbeville
v
Ryan.

produced parol evidence may be given of its due execution and of its contents, (1 Starkie, 317, 345, 347: 6 Term Rep. 556,) and parol proof cannot be given of its contents till such notice has been served upon the opposite party or his attorney.

H. S. Kemble, for the defendant in error. 1. The written authority of one partner to bind his co-partner by deed may be shown by parol proof, (*Jackson vs. Porter*, Martin's La. Rep. 200,) and if there be a previous parol authority given by a partner to his co-partner to execute a deed for him, or if there be a subsequent adoption of the deed by express assent, or by acts and conduct ratifying the deed, the partner will be held responsible by the deed. 3 Kent's Com. 48: *Skinner vs. Dayton*, 19 Johnson, 513: 1 Hall, 262: *Cody vs. Shepherd*, 11 Pickering, 400: *Person vs. Carter*, 3 Murphy, 321: *Mackay vs. Bloodgood*, 9 Johns. 285.

2. To the jury belonged the province of weighing the testimony and determining upon the sufficiency or insufficiency thereof; and this court has fully settled the law that a new trial shall not be granted in civil cases upon the ground that the verdict of the jury is against the evidence unless there is a decided preponderance against it amounting to rashness. *Perry vs. Smith and Mayfield*, 4 Yerger, 323: *Grubbs vs. McClatchy*, 3 Yerger, 442.

GREEN, J. delivered the opinion of the court.

This is an action of debt, brought by Ryan, as assignee of Reuben Bartlett, upon a bill single, purporting to have been executed by Turbeville and Darden to the said Bartlett, for two thousand three hundred and twelve dollars and seventy-five cents. Darden, one of the defendants, pleaded *non est factum* to the action, and on the trial proved that himself and Turbeville were partners in trade, and that the bond upon which this suit was brought was executed by Turbeville in the partnership name, and that it was not signed or sealed by him or in his presence. The plaintiff proved that on the day of the execution of the bond, or the next day, Darden called upon the payee of the note and told him that he was

then ready to close the contract and then give his notes for the amount. Bartlett then informed Darden that his partner, Turbeville, had given notes signed Turbeville and Darden, with which he expressed himself satisfied; but the bond was not shown to him, nor was he informed that obligations under seal had been executed. The plaintiff further proved that at the time the bond in the pleadings mentioned was executed, the said Turbeville executed one or more similar bonds in the name of Turbeville and Darden, which were paid, both the defendants at different times during the partnership paying money on said bond. The plaintiff proved by another witness that the bond in the pleadings mentioned was placed in his hands for collection; that he called upon Darden and told him he wanted him to pay the said note. He said he knew he was bound for said note, but that they had dissolved partnership, and that Turbeville was to pay the debts. Witness did not show the bond to Darden, nor does he know Darden ever saw it; in speaking of the claim he called it a note, and he did not inform Darden that it was under seal. Several credits were endorsed upon the bond, expressing in general terms that the sums credited were paid by Turbeville and Darden. The court charged the jury "that one partner had not, by virtue of the partnership, power to bind his co-partner by bond, unless such partner had authority under seal to do so; but if they believed from the testimony that defendant, Darden, had paid notes under seal executed at the same time and upon the same consideration to the same parties, and that he had subsequently admitted that he was bound by the note sued on, the court would leave it to the jury to determine the facts whether any authority under seal had been given by Darden to Turbeville to bind him by bond at the time of the execution of the specialty sued on; that unless they had positive proof of the existence of such authority at the time of the execution of the bond, or were satisfied from all the facts and circumstances that such authority did then exist, their verdict should be for the defendant, Darden; but, if they believed that such authority did at the time of the execution of the bond exist, their verdict should be for the plaintiff." The jury found a verdict for the

NASHVILLE.
December, 1839.Turbeville
v
Ryan.

NASHVILLE,
December, 1839.

Turbeville
v
Ryan.

plaintiff, and the defendants moved for a new trial, which motion was overruled by the court and judgment rendered upon this verdict, from which this appeal in error is prosecuted.

No objection is made by the plaintiffs in error to the general doctrine stated by the court in the charge to the jury; but it is insisted his honor erred in assuming "that if Darden had paid notes under seal, executed at the same time, and upon the same consideration to the same parties, and had subsequently admitted that he was bound by the note sued on," these facts would be evidence from which the jury would be authorized to infer that Turbeville had authority from Darden under seal to bind him at the time the bond sued on was executed. We do not think the facts thus stated by the courts authorize the inference which it was indicated the jury might make. None of the facts go so far as to assume that subsequent acts of ratification constitute evidence that the deed was executed by virtue of a written authority under seal existing at the time. If the existence of such authority be necessary, its production could not be dispensed with unless it were shown to have been lost or destroyed, or otherwise beyond the power and control of the party desiring to prove its contents. 1 Starkie, 436. There can be no reason why this general rule of evidence in relation to written instruments should be dispensed with in this case. Parol proof therefore that Turbeville had authority under seal to bind his co-partner would have been inadmissible, much less could evidence of the manner in which Darden had acted in reference to other contracts of a similar character establish the existence of such authority. But it is insisted that although a party may not have a written authority under seal to bind his co-partner by deed, yet, if such co-partner subsequently assent to the contract, he is bound, and that the circumstances enumerated by the court to the jury were competent evidence to prove such subsequent assent. If it were admitted that such subsequent assent would bind a party, still the question whether there was such subsequent assent was not propounded to this jury, nor did they consider of the testimony in reference to such question. It could

not therefore be said that they had found the fact that Darden had so assented. They were told that it must be proved that Turbeville acted under an authority by deed. This enquiry was as to the existence of such authority; and they were told they might find, and they did find, from the facts and circumstances enumerated, that such authority did exist. This being illegal the verdict cannot be supported, even though we should think the evidence might have sustained a finding upon the principle which it is insisted on should have been stated by the court, because that principle not having been stated, the evidence was not considered in reference to it.

NASHVILLE,
December, 1839.

Turbeville
v
Ryan.

2. But we cannot adopt the principle contended for by the counsel for the defendant in error. The two cases upon which they rely, (*Cody vs. Shepherd*, 11 Pick. 400, and *Grann vs. Seton and Bunker*, 1 Hall's Rep. 262,) seem to us virtually to have abandoned the doctrine that one partner cannot bind another by deed unless expressly authorized to do so by an instrument of equal dignity. For they hold that a previous parol assent, or a subsequent adoption, will bind the party though no written authority under seal existed. To assume this position in one sentence, and in the next to adopt the doctrine laid down by Lord Kenyon in *Harri-son vs. Jackson*, 7 Term Rep. 207, seems to us contradictory and absurd; for if a previous assent or subsequent parol adoption will do to bind the party, certainly there is no necessity for a written authority under seal to do it.

But upon this question our own court has made two concurrent decisions, which we are not at liberty to disregard. In the case of *Nunnely vs. Doherty*, 1 Yer. Rep. 26, the court say "that no authority is given a partner by the law merchant to bind his co-partner by deed, nor does the fact that the articles of co-partnership were under seal give him such authority merely from the circumstance of their being sealed; to have this effect a special power or authority must be contained in the articles." This case was followed by the case of *Waugh and Finley vs. Carriger*, 1 Yerger, 31, and by many other cases which have not been reported, so that at this time we feel bound by their authority; and although the doctrine is no favorite with us, yet, if we adhere to it at

NASHVILLE,
December, 1839.

M'Clanahan
v
Keeble.

all, we feel bound to maintain it in good faith. Certainly the alarm which Lord Kenyon in *Harrison vs. Jackson* supposes the mercantile world would feel, however justly it may have been apprehended in England, could not be felt here if it were determined that one partner might bind the other by a contract for the payment of money though made under seal. But the contrary doctrine is too firmly established to be shaken by the courts, and if changed at all it must be done by the legislature. Reverse the judgment,

M'CLANAHAN vs. KEEBLE.

M'Clanahan obligated himself to serve Keeble thirteen months for a stipulated compensation as an overseer. He served a portion of the time and then, by parol agreement, Harrison was substituted in the place of M'Clanahan, who served Keeble the balance of the thirteen months: Held, in an action of covenant by M'Clanahan against Keeble for his wages, that he could not allege and prove by parol that Harrison's service was substituted in lieu of his own; such an agreement discharged as to one by subsequent parol agreement cannot be enforced as to the other.

Samuel M'Clanahan instituted an action of covenant in the circuit court of Rutherford county, on the 3d day of May, 1838, against Walter Keeble. At the March term, 1839, the court, the honorable Samuel Anderson, judge of the fifth circuit, presiding, gave judgment for Keeble upon a verdict rendered in his favor. From this judgment M'Clanahan obtained an appeal in the nature of a writ of error to the supreme court.

Ready, for the plaintiff in error, cited the following cases: *Fleming vs. Gilbert*, 3 Johnson's Rep. 528: *Hotham vs. East India Company*, 1 Term Rep. 638: *Dearbourne vs. Cross*, 7 Cowen, 48: *Lattimore vs. Haison*, 14 Johnson, 330: 1 Vern. 240: *Keating vs. Price*, 1 Johns. Cases, 22: *Thompson vs. Ketchum*, 8 Johns. Rep. 189.

Keeble, for the defendant, cited 13 Johns. Rep. 87: *The People vs. Manning*, 8 Cowen, 297: *Whitney vs. Spencer*, 4 Cowen, 39: 10 Johns. Rep. 27: *Dutch Church of Albany vs.*

Bradford, 8 Cowen, 457: *Taylor vs. Butler*, 6 Cowen, 624: *Nashville*,
Richards and others vs. Hodges, 2 Saund. Rep. 84, note 1: *ib.* December, 1839.
 117: 1 Johns. Rep. 138: 2 Saund. 475, note 1: *Van Antwerp* M'Clanahan
vs. Stewart, 8 Johns. Rep. 125: *Freeman vs. Adams*, 9 Johns. v
 Rep. 114: *Lewis vs. Green*, Peck, 161: *Bond vs. Jackson*, Keeble.
Cooke, 500: *Phillips vs. Ranor*, 2 Term, 329: *Allison vs. Rut-*
ledge, 5 Yerger, 193: *Wood vs. Goodrich*, 9 Yerger, 266:
Jones vs. Ward, 10 Yerger, 166: *Thompson vs. Ketchum*, 8
 Johns. Rep. 189: Petersdorf's Ab. 418: *Thompson vs. Browe*, 6,
 7 Taunton, 656.

REES, J. delivered the opinion of the court.

This is an action of covenant instituted upon an agreement under the seals of the plaintiff and defendant, which stipulated that the plaintiff would for thirteen months, from the 1st December, 1836, to the last December, 1837, perform on the farm of the defendant the duties of an overseer to the best of his skill and knowledge; and that the defendant, on account of his services, would pay the plaintiff two hundred dollars, and furnish him with certain articles of provision for his family and of provender for his horse. The declaration alleges that the plaintiff rendered the stipulated services as overseer to the best of his skill and knowledge, and assigns as a breach of the covenant on the part of the defendant that he had neither paid the money in the covenant mentioned nor furnished the provisions and provender. The defendant pleaded: first, covenant performed, upon which issue was taken; and, secondly, that the plaintiff did not faithfully perform his duty as overseer for the time of thirteen months, but absented himself from the service of the defendant before the expiration of that time. To this the plaintiff replied specially, "that although it was true that he did not serve out the term of thirteen months as an overseer for the defendant, he was released and discharged by the parol consent and agreement of said defendant on the 20th day of December, before the expiration of said thirteen months, and by which agreement the defendant was to accept and receive the services of one James Harrison from the said 20th of December before the expiration of the said thirteen

NASHVILLE,
December, 1839.

M'Clanahan
v
Keeble.

months, in the place, room and stead of him, the said plaintiff." To this replication the defendant demurred. A verdict was found for the plaintiff, and his damages assessed upon the plea of covenant performed. But upon the demurrer the circuit court gave judgment against the plaintiff; to reverse which he has prosecuted his writ of error to this court. The case has been well and fully argued on both sides. We entertain no doubt that the judgment of the circuit court is correct. Waiving the consideration that the replication departs from the declaration, (see 2 Saunders, 84, note 1,) and taking the matter of the replication as if alleged in the declaration in the room of the general allegation of performance there set forth, it then presents the case of a plaintiff in an action of covenant seeking to enforce the covenant and to recover damages for its breach against the defendant, while, at the same time, he attempts to vary and diminish his own obligations, arising from the covenant, by an alleged parol agreement. This he cannot do on well established principles. The rule has received frequent recognition in the adjudications of this State; it is regarded also as well settled in England. Without unnecessarily multiplying references, it will be sufficient to cite the judgment of Ch. Justice Gibbs in the case of *Thompson vs. Brown*; 7 Taunton, 656. In that case a number of other cases involving the same principle are cited and commented on. The Chief J. in that case says, "The only question is, whether a delivery at Liverpool can be substituted for a delivery at London so as to enable the plaintiff to recover upon this covenant the same freight and demurrage as if he had delivered the cargo at London. The maxim of law which meets one in this case is, that matters which are contracted for by deed cannot be dissolved except by deed." It is true there are cases, as that of *Fleming vs. Gilbert*, 3 John. Rep. 527, where the rigor of this principle is somewhat relaxed on behalf of a defendant seeking to discharge himself from damages for a breach of covenant by showing some substituted agreement of modification or satisfaction. In the case already referred to, of *Thompson vs. Brown*, the distinction in question is alluded to by Ch. Justice Gibbs, and he quotes Lawrence, J. as saying, in the case of

Heard vs. Wadham, 1 East, 619, "that all the cases cited, where the substitution of one thing for another was admitted, were cases where, subsequent to the breach of the covenant, the covenantee had agreed to accept another thing in satisfaction of his damages, which was an answer to an action for the non-performance of the thing stipulated." And Ch. Justice Gibbs adds: "I can understand the doctrine that a man has been paid his damages by accepting something else in lieu of that to which he was entitled; but a plaintiff cannot aver that by parol something else has been substituted for that which the covenant required him to do." We affirm the judgment.

NASHVILLE,
December, 1839.

Vaughn
v
Law.

VAUGHN vs. LAW.

Where the legal right of complainant is clear, the existence of a nuisance manifest, and the injury of a character not to be compensated in damages, a trial at law is not necessary in order to give a court of chancery jurisdiction in such cases.

Mitchell erected a dam which caused the water to overflow the land of Vaughn; Vaughn, in an action at law, recovered damages against Mitchell, and by a decree in chancery based thereupon had the dam abated; Mitchell sold his land to Jones; Jones re-built the dam lower down on the same creek, so as to overflow the same land of Vaughn as high as the first dam, and sold to Law without notice of the previous proceedings at law and equity: Held, that law was a privy in estate by the purchase, and stood in the same situation with Mitchell, and that the judgment against Mitchell established the nuisance against him.

On the 28th day of February, 1838, Dixon Vaughn filed a bill in the chancery court at Columbia, Maury county, against Samuel Law. Vaughn alleges in his bill that in 1819 or 1820 he purchased and took possession of a tract of three hundred acres of land on Fountain creek, in Maury county, and in 1824 he procured a deed in fee simple therefor; and that his possession of the premises had been continued from the time he purchased the same till the filing of this bill; that there was but one lasting spring upon the tract; that it furnished cool and wholesome drinking

NASHVILLE,
December, 1839.

Vaughn
v
Law.

water, and that he erected his dwelling house with a view to the use of the water furnished by the spring, cleared a farm and made valuable improvements thereupon; that the spring was about thirty yards distant from the creek, in a sink, and had an outlet under ground to the creek; that the creek run in a semi-circle around a portion of his tract, the land lying east of the creek, and the eastern margin of the creek being the boundary of the tract, so that the whole bed of the creek belonged to the complainant, and that since 1819, it had been used and enjoyed by him for stock water and for other purposes; that Mitchell was the owner of a tract of three hundred acres adjoining the tract of complainant on the same creek and next below; that within about three hundred yards of complainant's lower line, in the year 1824, said Mitchell erected a mill-dam across the said stream; that in consequence thereof the water of the stream backed up so as to overflow said spring, and render the water thereof totally unfit for use; that the water in the bed of the creek upon the premises of complainant became stagnant and fetid, and the health of his family was destroyed in consequence thereof; that a fish-trap of complainant was destroyed thereby; that the creek was rendered inconvenient of passage, and other inconveniences and injuries inflicted upon complainant by the erection of said mill-dam; that not more than three quarters of a mile in a straight line above complainant's premises there was a mill, and there was another within three or four miles below, and two others within four miles of the mill so erected by Mitchell; that in 1824 he instituted an action in the circuit court of Maury county against said Mitchell for the creation of a nuisance by the erection of said dam, and recovered a judgment against him for the sum of seventy-five dollars, damages; this did not cause an abatement of the nuisance, and at the June term, 1829, in an action subsequently instituted for the continuance of the nuisance, he recovered a verdict and judgment for the sum of forty-three dollars, damages, and the further sum of forty-three dollars, costs; this did not effect an abatement of the nuisance, and in 1830 he filed a bill in the chancery court

NASHVILLE,
December, 1838.

Vaughn
v
Law.

at Columbia against Elizabeth Mitchell, relict of said Mitchell, deceased, and all the heirs of Mitchell who had an interest in the tract of three hundred acres aforesaid, and in his bill made the allegations above set forth; that this suit was tried at March term, 1833, upon full proof, and that it was then ordered, adjudged and decreed, that as it appeared to the satisfaction of the court that "in ordinary stages of the water in said creek the dam so erected caused the water to set back upon and entirely to cover the complainant's spring, whereby it had become entirely unfit for use, and that the continuance of said dam would be a material and permanent injury to the complainant, that so much of said dam as caused the water in said creek to set back upon, cover, overflow or drown in any, the least degree, whatever, the said spring, be abated and prostrated;" that commissioners were appointed by the order of the court for the purpose of ascertaining the height at which the said dam might be suffered to remain without overflowing the complainant's spring; and that said commissioners reported that the dam should be cut down so as to be four feet high and no more; that said report was confirmed by the court, and the dam cut down accordingly; that in this condition it continued till the year 1837, at which time Stephen B. Jones purchased the aforesaid three hundred and twenty acre tract from Mitchell's heirs; that said Jones had no other or better title to the land than Mitchell's heirs had; that he purchased with a full knowledge of the two judgments at law against Mitchell, and the decree of the court of chancery ordering the nuisance to be abated, as before stated; and that "in the year 1837 he re-built or erected anew the said dam, or a new dam on the said tract of land, across Fountain creek, at the same place where the former dam stood," in contempt of the decree of the chancery court in 1833, and against the protestations of complainant; that said Jones by deed dated the 2d January, 1838, conveyed the said tract of land to one Samuel Law, then a citizen of the county of Maury, and under said conveyance said Law had taken possession of the tract of land, and continued the nuisance created by the erection of said dam; that said Law purchased the land with

NASHVILLE,
December, 1839.

Vaughn
v
Law.

full knowledge of the two judgments at law and the decree aforesaid. The bill alleges further that the injury complained of by the erection of said dam is permanent, and such as admits of no compensation in damages, and prays that the nuisance be abated.

The defendant filed a demurrer to this bill, and for cause of demurrer sets forth the following, to wit: "It appears, from complainant's showing, that Stephen B. Jones erected the mill-dam complained of on his land, which said Jones had a right to do, and the complainant had not, by judgment in a court of common law against Stephen B. Jones, established the fact that said Jones had created a nuisance by the erection of the dam aforesaid, nor that said Law had continued the said nuisance; and defendant insists that until complainant shall have established the fact as aforesaid, against the party or parties aforesaid, and settled the rights of the parties, that a court of chancery cannot take jurisdiction of the cause."

The complainant joined in demurrer, and on the 24th day of March, 1838, the court overruled the demurrer, and ordered that the defendant have leave to answer.

Samuel Vaughn filed his answer, and states that he knows nothing with regard to complainant's title to the tract of land which he claims in his bill, but admits that he purchased, in the fall of 1837, of Stephen B. Jones, a tract of land containing three hundred acres, on Fountain creek, in Maury county, on which is situated the mill and dam spoken of in complainant's bill, and the mill and dam was then in the condition it was in when the purchase was made by him; and that he was informed and believed that Stephen B. Jones purchased the same from J. D. Mitchell and Edwin Mitchell, two of the heirs of Mitchell, deceased; that he had resided in the county of Maury but a short time, and that he knew nothing of the two verdicts and judgments alleged by the complainant to have been recovered against Mitchell, deceased, and that he knew nothing of the alleged decree in chancery in regard to said dam; that J. D. Mitchell and Edwin Mitchell "were minors at the time and date of all the transactions set forth in complainant's bill, and insis-

NASHVILLE,
December, 1839.Vaughn
v
Law.

ted that the alleged judgments at law and the decree in chancery were void as to them, and did not estop them, or those claiming under them, from contesting the right of complainant to have the dam abated; that the minors aforesaid were poor and necessitous, and that the decree spoken of, was obtained by compromise; that the mill-dam was erected by S. B. Jones, and entirely completed by him before respondent became the purchaser of the land; that it was in the same condition then as it was at the date of the purchase; that he did not know with certainty that it was more than five feet high, but supposed it was a few inches higher than five feet; and that he was informed by S. B. Jones, and believes that said Jones built the mill-dam without objection on the part of complainant; that the spring alluded to in complainant's bill had been abandoned by complainant for years before the building the mill, that a large rock was placed over the mouth of it, rubbish had been washed over it, which so completely stopped it up that the place of its location could not be discovered, and that it was in that condition when Jones erected the dam complained of; that the difficulty of passing the creek after the dam was erected and the alleged destruction of the ford were the chief causes of complaint put forth by complainant after the erection of the dam; and that complainant proposed that if respondent would give him for the injury done the ford the paltry sum of twenty-five dollars he would not institute suit for the alleged nuisance; that the creek was not rendered impassable, and that the health of complainant was not injured by the overflow alleged to have been created by the mill-dam.

The answer insists that defendant was a stranger to the suits at law and equity against Mitchell and Mitchell's heirs, and that they did not bind him; that the dam, for the prostration of which the said suits at law and the suit in equity were instituted, is not the same dam now complained of, and that said judicial proceedings did not establish the existing mill-dam to be an injury to the property or an infringement of the rights of complainant; and that the court had no jurisdiction till the nuisance complained of was

NASHVILLE, established against him by a verdict at law and a judgment
December, 1839. thereupon.

Vaughn
v
Law.

At the September rules, 1838, the complainant filed a general replication to the answer of the defendant.

The proof in the cause shows that the complainant and defendant owned respectively the lands set forth in the bill and answer, and were in possession of the same, and that Fountain creek run through them as alleged; that there was but one lasting spring upon the land of Vaughn, which was the one for the overflow of which this bill was filed; that Mitchell built a dam across Fountain creek on his own premises, about three hundred yards below the lower boundary line of complainant's land, which caused the water of the stream to overflow the spring; that the spring was in a sink about thirty yards from the bank of the creek; that the water of the spring was good wholesome drinking water before the erection of the dam complained of, and that complainant used it occasionally but not constantly before the erection of the dam; that before the erection of the dam the water was injuriously affected by the water of the creek at times when there were swells in it, and that after the erection of the dam the water was totally destroyed and rendered unfit for drinking water; that there was a ford across the creek on the land of complainant, through which the complainant was accustomed to pass in going to a mill belonging to his son about three quarters of a mile above the mill of defendant; that this ford, though difficult generally of passage, was rendered more so by the back water of defendant's dam; that the sickness in the family of complainant had been somewhat increased since the erection of the dam, though no evidence to prove that the increase of sickness may not have been occasioned by other causes was introduced.

It was in proof also that the several verdicts and judgments at law against Mitchell were obtained as set forth in complainant's bill, and that the decree in chancery was rendered ordering that the dam should be reduced in height to eight feet. There was no evidence that Law knew

of the existence of the judgments at law or the decree in chancery at the time he purchased the property from S. B. Jones, who purchased it from the heirs of Mitchell, deceased. It appears that the dam was cut down in conformity with the decree; but the dam still affected injuriously to some extent the spring, which was abandoned by complainant, and covered up with rock and rubbish for several years, with the alleged purpose of keeping stock from falling into it. The dam of Mitchell was broken down by drift-wood after its height was reduced by the decree in chancery, and continued in this condition nearly two years. The property was sold in this dilapidated condition to Stephen B. Jones; he removed the fragments of the broken dam and re-erected a new dam at the same place; he knew of the previous judicial proceedings by which the dam built by Mitchell had been abated, and proceeded to erect the new dam in opposition to the known wishes of complainant, who, about this period, uncovered his spring and hung a gourd in the vicinity. Jones put the mill in operation and sold the property to defendant, Law. The dam erected by Jones was higher than that built by Mitchell. Such is the substance of the great mass of testimony in the record.

NASHVILLE,
December, 1839.

Vaughn
v
Law.

At the September term, 1839, the cause came on to be heard upon the bill, answer, replication and proof. The chancellor being of the opinion that Law was a privy in estate with Mitchell, deceased, and with the heirs of Mitchell, and that the dam had been previously decreed to be a nuisance and ordered to be abated so as not to exceed five feet in height above the level of the lower sill and the court regarding the decree so far binding upon all the parties and privies as to place the burden of proof, to show that it had ceased to be such nuisance, on those who claim a right to erect or continue said dam higher than it was ordered to be in the decree aforesaid and the chancellor, being further of opinion that such proof had not been made, ordered, adjudged and decreed that said Law abate and lower said dam so that it shall not exceed the height of five feet above the horizontal level of the lower sill immediately adjoining the mill-house, according to the principles heretofore de-

NASHVILLE, December, 1839. clared in the case of Vaughn against the heirs of Mitchell. The defendant appealed.

Vaughn
v
Law.

Pillow, for the plaintiff in error, contended: 1st. That the dam complained of was not a nuisance; the proof exhibited wholly failed to establish the charge in the bill that the health of complainant's family had been destroyed by the erection of the dam, and the spring not furnishing good water at any time, and being injuriously affected by every swell in the creek by its communication therewith, was wholly abandoned and covered up by complainant with rock and rubbish; the injury if any was slight. *Lex de minimis non curat*.

2. That the bill did not charge that the dam now complained of was the same dam erected by Mitchell, and abated by a decree of the chancery court as a nuisance; that proof showed that it was not the same dam, but a new and different dam, erected some six or seven years after Mitchell's dam was built, by a different person and with other materials; that the dam erected by Jones has never been declared by judicial proceedings to be a nuisance. If it be not the identical dam built by Mitchell, and declared a nuisance in chancery based upon proceedings at law, it cannot be regarded as the same nuisance, nor as a continuance of the same, but as the creation of a new nuisance, if it be a nuisance at all. The dam built by Jones may be very different in its nature and effects from that erected by Mitchell. The question as to whether the last erected dam is a nuisance is in issue between the parties; until this question is settled by the verdict and judgment of a court of law, this court has no jurisdiction of the case. *Caldwell vs. Knott*, 10 Yer. 209. Whatever facts may be exhibited in proof, this being a case of ordinary nuisance, the chancellor had no right by the rules of law to determine the fact of nuisance or no nuisance. The verdicts obtained against Mitchell did not establish at law the present dam to be the same nuisance, nor a continuance thereof, though it be admitted that Law is a privy in estate with Mitchell. This is not a technical quibble. The verdicts would be conclusive against

Mitchell's dam. They would not weigh any thing against a dam erected by Jones seven years afterwards. The court then is asked to take jurisdiction of a case of alleged nuisance in which there has been no proceedings at law to determine the rights of complainant; and the question to be determined is, whether this is one of the cases in which a court of chancery will take jurisdiction without previous proceedings at law. He contended that it was not. If the evidence be conflicting and the injury doubtful, this alone will be sufficient reason for withholding the interposition of a court of chancery. 2 Story's Eq. 204. The injury must not have been already inflicted; it must be impending, or the party complaining will be turned over to a court of law.

NASHVILLE,
December, 1839.

Vaughn
v
Law.

3. The injury must be such as cannot be compensated in damages; a mere diminution of the value of property by the nuisance, without irreparable mischief, will not furnish any foundation for equitable relief. *Attorney General vs. Nichol*, 16 Ves. 342; *Winstanly vs. Lee*, 2 Swans. Rep. 336; *Earl of Kipon vs. Hobart*, 3 M. and K. 179. He contended, therefore, that the present case was not such as would justify a court of chancery in assuming jurisdiction in the absence of a judgment at law establishing the nuisance complained of.

Nicholson, for defendant in error. The court below acted correctly in overruling the demurrer.

1. The bill charges that "Jones proceeded to re-build or erect anew the said dam or a new dam on the said tract of land at the same place where the former dam stood." This language is explicit as to the identity of the nuisance complained of with that ordered by the court in 1833 to be abated; and the defendant, Law, standing in the relation of a privy in estate, could not require the fact of nuisance or no nuisance to be again submitted to a jury. The defendant was affected with notice of the two judgments at law and the decree of the chancery court, they being matters of record, and therefore cannot set up any want of actual notice.

2. The fact of nuisance having been established by the

NASHVILLE,
December, 1839.

Vaughn
v
Law.

actions at law, and the decree abating the dam being matter of record, the defendant was not only effected with notice thereof, but, upon assuming the relation of a privy in estate, must submit to all the consequences attendant upon the matters of record. The record established the fact of nuisance as against Mitchell and his heirs; of course the purchaser from Mitchell's heirs would take the land subject to the consequences of this recorded fact, and would occupy the same position with the heirs of Mitchell. The decree of the chancery court abated the dam and enjoined the heirs of Mitchell from re-building it; of course the purchaser from the heirs of Mitchell would take the land with this injunction attached to it. The power to abate nuisances and restrain men from erecting them is of no avail if it can be avoided and evaded by a mere transfer of the land. The virtue of the injunction, to be sufficient, must accompany the transfer and attach to the purchaser as well as to him against whom it was pronounced. It was the opinion of the court below that the judgment in 1833 was so far binding upon the parties and their privies as to place the burden of proof; to show that it had ceased to be such nuisance, on those who claim a right to re-erect or continue said dam. It might happen that a spring that was once valuable would cease to run altogether, and to cover it with back flowage would therefore be no nuisance; but there can be no pretence in this case that the spring ceased to run or be valuable; the proof is abundant to the contrary.

3. It is insisted, that after the prostration of the dam in 1833, the spring was abandoned by complainant. The proof does not show an abandonment of the spring. The reason for the non-user of the spring whilst the dam was five feet high is proved, to wit, because it still flooded the spring. If the defendant desired to avoid the effect of the decree in 1833 it rested upon him to show a clear and permanent abandonment of the spring and an acquiescence in its destruction. The right of complainant to his spring was as perfect as his right to his land; whether he chose to use it or not, his right to its use could not be barred except by an express license to destroy it, or such an acquiescence in

NASHVILLE,
December, 1839.Vaughn
v
Law.

its destruction as would show a total and permanent abandonment of it to the use of another. If no such license be shown, then no abandonment for a less time than seven years, and an actual destruction of it during that period, ought to raise even a presumption against his right. No such license or acquiescence is shown; on the contrary, so soon as Jones commenced building the dam Vaughn hung out his gourd as notice that his spring was not abandoned.

4. It is urged that the present dam across Fountain creek is not the same dam against which the decree of 1833 was pronounced; that it was made at a different time by a different person and with different materials. From this it is argued that it is not the same nuisance but a new nuisance, which is the proper subject matter for an investigation before a jury with a view to the settlement of the rights of the parties at law. It is admitted that both dams were erected at the same place, and it is not controverted that the present dam is higher than that built by Mitchell, and backs the water farther up the creek; and yet it is insisted that the nuisance thus created is a new nuisance! The dam which creates the nuisance is confounded with the nuisance itself; Mitchell's dam flooded complainant's spring, and thereby produced a nuisance; Law's dam flooded complainant's spring, and thereby produced a nuisance; both dams create the same nuisance, viz. the flooding of the spring. The verdicts of the juries in the one case would properly settle the rights of the parties in the other, and would give a court of chancery jurisdiction of the cause.

GREEN, J. delivered the opinion of the court.

This bill is filed to have a nuisance abated. The defendant has a mill, the dam of which is raised so high as to overflow the only spring of complainant and destroys the water. The land now owned by defendant was formerly owned by one Mitchell, who first erected the mill and dam. In 1824 the complainant recovered of Mitchell, in an action at law, damages for an injury done his spring by the erection of said mill-dam. In 1826 complainant prosecuted a second action for a continuance of the nuisance, and obtained another judg-

NASHVILLE,
December, 1839.

Vaughn
v
Law.

ment. In 1830 complainant filed his bill praying that the nuisance be abated. In 1833 a decree was rendered that the dam should be cut down, so that the pond should not overflow the spring. The dam was cut down and so remained until Mitchell sold his land to one Jones, who, in 1837, proceeded to re-build the dam, and then sold the dam and mill to defendant, Law. The complainant sets forth these facts in his bill, and prays that the said nuisance be abated. To this bill there is a demurrer, on the ground that complainant should have established the existence of the nuisance in an action at law; and that not having done this, a court of chancery has no jurisdiction of the case. This demurrer is not well taken. If an action at law and a verdict of a jury were necessary in the first place to establish the existence of a nuisance, the suit and judgment against Mitchell for this same nuisance stand on record, and as effectually establish the fact against this defendant as against Mitchell, from whom he derives his title. Having placed himself in the relation of a privy in estate, he must submit to all the consequences of this recorded fact, as by purchasing the land from Mitchell he places himself in the same position in reference to this matter. But the counsel have misconceived the case of *Caldwell vs. Knott*, 10 Yer. Rep. 209. In that case the defendant urged a verbal license on the part of the complainant's ancestor to build the mill; that it had been erected, and the spring overflowed for ten years before the bill was filed. Under these circumstances the court said the right of the complainant was not clear, and the length of time the mill had existed, together with the other facts proved, made it questionable whether the defendant had not acted under a license in the erection of his mill. It was therefore determined, that before a court of chancery would take jurisdiction in such a case, the existence of the nuisance must be established at law. But in a case where the right is clear and the existence of the nuisance manifest, and the injury is of a character that cannot be compensated in damages, a court of chancery interposes to prevent the mischief. In such case a trial at law is not necessary in order to give jurisdiction. On an examination of the case of *Caldwell vs. Knott*, it will be per-

ceived that there is nothing in that case opposed to the views above taken. The demurrer was properly disallowed, therefore, upon either of the foregoing grounds.

NASHVILLE,
December, 1839.

Peyton
v
Peacock.

The proof amply sustains the allegations of the bill. The spring which is overflowed is the only one on the plantation of the complainant. It is true he did not use it for a considerable time. Why he did not is left to conjecture; but that can make no difference. He did not acquiesce in the destruction of it by the defendant's pond; and if he were deprived of its use he would be entirely dependant upon the pleasure of his neighbors for water. Indeed we do not see why the complainant did not proceed against the defendant for contempt for the violation of the former decree instead of filing this bill.

Let the decree be affirmed.

NOTE.—Tenant for years erected a nuisance and afterwards made an under-lease to J. S. The question was, whether after a recovery against the first tenant for years for the erection, an action would lie against him for the continuance after he had made an under-lease. *Et per cur.* it lies, for he transferred it with the original wrong, and his demise affirms the continuance of it; he hath also rent as a consideration for the continuance, and therefore ought to answer the damage it occasions. *Rosewell vs. Prior*, Salk. 460. Receipt of rent is upholding. *Cro. J.* 373, 555. The action lies against either, at the plaintiff's election.

PEACOCK *vs.* TOMPKINS, *et als.* O. B.

PEYTON *vs.* PEACOCK, *Cross Bill.*

A clerk in taking probate of a deed of bargain and sale of property, by the acknowledgment of the bargainor, must allege his personal acquaintance with such bargainor, or such certificate will be defective and the deed will create no lien as against a judgment creditor.

Where a deed of trust and its authentications are exhibited to the court in a bill: Held, that the court is bound to notice its defects in a question of lien, though the answer did not insist upon its defective probate.

William Turner was indebted to Tompkins in the sum of three hundred and twenty-three dollars and thirty-one cents, to Patterson and Tompkins in the sum of one hundred dol-

NASHVILLE,
December, 1839.

Peyton
v
Peacock.

lars, to D. M'Auly in the sum of one hundred and forty dollars, and to D. and A. M'Auly in the sum of six hundred and twenty-nine dollars and fourteen cents, and being in embarrassed and failing condition, executed on the 7th day of July, 1837, a deed by which he conveyed in trust to Charles Lewis all his personal property, supposed to be worth about sixteen hundred dollars, for the purpose of securing the above named individuals in the payment of their several debts. For the purpose of covering this property with a sufficient amount of debt, and probably with a view to secure to himself a further credit with Tompkins and D. and A. M'Auly, he executed a note, on the same day the deed was executed, to Tompkins for the sum of three hundred dollars, to be due on the 25th of December, 1837, and another to the M'Aulys for two hundred, to be due on the 1st of January, 1838.

On the 20th of January, 1838, Turner confessed judgment in favor of Peacock for the sum of one thousand and seventy-two dollars and eight cents, that amount being due Peacock from Turner. On the 28th of same month a *fi. fa.* was issued on the judgment, which was directed and came to the hands of the sheriff of Sumner county, and was returned by him on the 29th of the same month, *nulla bond.*

Peacock filed his bill in the chancery court at Gallatin on the 3d of February, 1838, against Lewis, Turner, and the beneficiaries in the deed of the 7th of July, declaring that the said deed was fraudulent, and praying that the property specified in said deed of trust might be subjected to the satisfaction of his judgment. It appears that on the 8th day of July, 1837, Turner executed a second deed of trust to Lewis, conveying a large proportion of the same property conveyed in the deed of the 7th, to secure a debt due to B. and J. H. Peyton of four hundred and forty-seven dollars. The deed provided that this debt should be satisfied out of the property "in the event there was a sufficiency left after discharging the several sums set forth and due in the deed of the 7th, or in the event that the deed of the 7th was vitiated and set aside."

The second deed was endorsed on the 10th day of July, 1837, with the following words, to wit

"State of Tennessee, Sumner county. The within deed of trust from William Turner to R. H. Lewis, trustee for the use and benefit of B. and J. H. Peyton, on one frame shop in South Gallatin, four kettles, one lead and three casts, stock of furs, all the hats, finished and unfinished, now in the shop, trimmings and all other materials, tools and furniture of every description appertaining to the same, notes, book accounts and one carryall and gear, was acknowledged by the said Turner this 10th day of July, 1837.

NASHVILLE,
December, 1839.

Peyton
v
Peacock.

THOMAS DONOHO,

Clerk of county court of Sumner."

This deed was registered on the 10th July, 1837. On the 27th of March, 1838, the Peytons filed their cross bill in the cause against all the parties to the original bill of Peacock, impeaching the deed of trust of the 7th July to Lewis for the same reasons that Peacock urged against it, and praying that it might be declared void and their deed established. They further allege that Peacock's judgment was obtained on the 20th of January, 1838, and that his *fi. fa.* issued on the 28th of the same month, and that the deed of trust made on the 8th of July, 1837, and acknowledged and registered on the 10th of the same month, "to Robert H. Lewis, for the benefit of B. and J. H. Peyton, as above exhibited in this suit, was the first *bona fide* lien upon the goods and effects thus conveyed as aforesaid by the said William Turner, and that said debt should be first satisfied out of the proceeds arising from the sale of said property."

The defendants to this cross bill answered it, and Peacock alleged that the defendants in the cross bill had acquiesced in the justice of the claims of the deed of the 7th of July, and affirmed the same, and that after the complainants had eviscerated the frauds in said deed by their bill complainants should not have any priority granted them.

The causes were brought on for hearing on the 10th of October, 1838. The chancellor, Bramlett, being of opinion that the deed of the 7th of July was fraudulent by operation of law, and that the deed for the benefit of the Peytons had not been proven and registered according to law, decreed that Peacock's judgment should be first satisfied, and

NASHVILLE, December, 1839.

Peyton
v
Peacock.

secondly, that the claim of the Peytons be discharged, and that if there was any balance left it should be applied *pro rata* to the satisfaction of the debts enumerated in the deed of the 7th July.

From this decree there was an appeal by the defendants to the original bill and by the Peytons. The supreme court on the 4th of January, 1839, affirmed the decree of the chancellor as to the invalidity of the deed of the 7th July for the benefit of Tompkins and others, (see Meigs' Rep. 317,) and having ordered that the clerk and master report to the next term of the court, the court declared that the question of priority as between the complainant in the original and complainants in the bill in the nature of a cross bill will be reserved till the coming in of the report.

At the December term, 1839, at the coming in of the report, it was argued by Mr. Guild for Peacock, and by Mr. White for the Peytons.

REESE, J. delivered the opinion of the court.

This case will be found reported in Meigs' Rep. 317, 331. It is therein stated that a question of priority as between the complainant in the original bill and the complainants in the bill in the nature of a cross bill would be reserved till the coming in of the report. That question has now been discussed; it is, whether the lien created by the *feri facias*, sued out by the complainant in the original bill upon certain chattels of the debtor, shall have precedence of that supposed to have been created by the deed of trust of the complainants in the bill in the nature of a cross bill, although the latter was registered before the issuance of the *feri facias*, upon the ground that the acknowledgment before the clerk upon which the registration took place was not in conformity to the provisions of the act of 1831, ch. 90, sec. 2, 3.

The second section of the act referred to requires the clerk in case of probate by witnesses to interrogate them as to whether they are personally acquainted with the bargainer, &c. and the form of the certificate for the clerk in that section given is, that the subscribing witnesses personally appeared before him, and having first sworn, depose and say

that they are acquainted with the bargainor or mortgagor, &c. The third section provides "that where any person or persons who have executed any of the above mentioned instruments wish to acknowledge the same, it shall be lawful for any of said clerks to receive said acknowledgments if he is personally acquainted with the person wishing to make the same, but not otherwise; in which case he shall put on said deed the following certificate: "State of Tennessee, — county. Personally appeared before me ——— clerk of, &c. the within named (the bargainor, obligor, &c.) with whom I am personally acquainted, and who acknowledged that he executed the within (deed, bond, &c.) for the purposes therein contained. Witness my hand, at office," &c. And to show how material the legislature deemed the personal acquaintance of the clerk with the bargainor, &c. and have fixed their policy on that subject, the act of 1833, ch. 92, sec. 13, provides that "in all cases where any deed or other instrument of writing shall be presented to any of the clerks aforesaid for acknowledgment, and the said clerk shall not be acquainted with the bargainor or bargainors, so as to make the certificate required by the act which this is intended to amend, (the act above referred to,) then and in all such cases it shall be the duty of said clerk to file such deed or other instrument, and note on his record of the probate of deeds the date of the presentation of such deed or other instrument, and the reason of the postponement of the acknowledgment thereof; and the party opposing the same, or interested in the acknowledgment thereof, shall and may produce witnesses before said clerk to prove the identity of the person offering to acknowledge the same, for which purpose twenty days shall be allowed the party by said clerk."

Similar provisions are made and similar forms of certificate are given in the act of 1835, ch. 53. Such being the state of the law on this subject, we will refer to the form of the certificate upon the deed of trust from Wm. Turner to the trustee of B. and J. H. Peyton. Is is as follows: "State of Tennessee, Sumner county. The within deed of trust from William Turner to R. H. Lewis, trustee, for the use and benefit of B. and J. H. Peyton," (here follows a description of

NASHVILLE,
December, 1839.

Peyton
v
Peacock.

NASHVILLE,
December, 1839.

Walton
v
Newsom.

the property conveyed,) "was acknowledged by the said Turner this 10th day of July, 1837. Thomas Donoho, clerk of the county court of Sumner."

This certificate is certainly defective in omitting to state that the clerk was acquainted with the bargainor, and perhaps in other particulars. The forms of certificate prescribed by the statutes in cases of probate and acknowledgment must be substantially complied with by the clerk to make the registration effective. But it is said that the answer of complainant to the bill in the nature of a cross bill admits the existence of the deed of trust, and, though it seeks to postpone the claim of the Peytons to that of Peacock, it is not on the ground of improper registration.

We think on this question of priority the deed of trust, with its authentications, being exhibited in the bill, the objection properly arose in argument, and the court was bound to see that the deed of trust created no lien. The decree of the chancellor on this point will be affirmed.

WALTON vs. NEWSOM.

Walton and Stewart were in litigation with regard to a tract of land; articles of compromise were entered into, by which it was agreed that Stewart should "have full possession of the land," reserving to Walton "the one-half of a mill site," &c: Held, that these articles of agreement conveyed no title whatever to Stewart, and did not estop Walton from asserting any subsequently acquired rights against Stewart or any purchaser from him.

Such articles did not constitute Stewart the tenant of Walton: they simply adjusted a disputed possession.

Where defendant read a deed signed by certain persons as executors: Held, that it operated as an admission that they were such executors, in lieu of proof to that effect by plaintiff.

This is an action of ejectment instituted in the circuit court of Wilson county on the 7th of May, 1836, by James Walton against Ansel B. Newsom for one hundred and fifteen acres of land lying in Wilson county on Cedar creek. It was continued from time to time till the 9th of February, 1839, when, on the plea of not guilty, a verdict was rendered

in favor of the defendant. A motion was made to set aside the verdict, which was overruled. Judgment was rendered upon the verdict, and an appeal in the nature of a writ of error taken to the supreme court therefrom. The facts of the case are sufficiently stated in the opinion of the court.

NASHVILLE.
December, 1839.

Walton
v
Newson.

Caruthers, for plaintiff, cited 5 Yerger, 217: *Duke vs. Harper*, 6 Yerger, 280: *Lane vs. Osment*, 9 Yerger, 86: 3 Pet. 49: 4 Bac. Ab. 884: 1 Burrow, 92: 3 Salkeld, 223; 6 Law Lib. 518, 519.

J. W. Campbell, contra. 5 Pet. Rep. 439: *Blight's lessee vs. Rochester*, 7 Wen. 535.

GREEN, J. delivered the opinion of the court.

In this case the plaintiff and defendant both claim under a grant from North Carolina to Thomas Clark for seven thousand two hundred acres, dated 15th September, 1787, and a deed from Tazewell Mitchell to William New for four hundred and ten acres, dated 28th February, 1825. The plaintiff relies upon possession of the land in dispute by New for more than twenty years, thereby affording a presumption of the existence of a deed from Clark to Mitchell. The plaintiff proved the death of William New, and then read a bond executed by him to James and Thomas Walton for a title to the land in controversy, which had been proved and registered, and then read a deed of conveyance from the executors of William New, to wit, Sarah New and John T. New, to himself for the land described in the bond, dated 10th December, 1835, which was proved and registered in the county of Wilson the next day. The defendant also introduced and read a deed from Sarah New and John T. New, executors of William New, deceased, dated 23d February, 1836, which was proved and registered. The defendant also proved that one John Stewart had been in possession of the land in dispute, claiming it as his own, and that he had purchased from Stewart and held possession under him. The defendant introduced the record of a suit in chancery, wherein Stewart was complainant and the lessor of the plain-

NASHVILLE,
December, 1839.

Walton
v
Newsom.

tiff, with others, was defendant, in which Stewart set up a claim for the land in controversy against the lessor of the plaintiff; no decree was made in said cause, but it was dismissed by the court for want of prosecution. The defendant read in evidence articles of agreement between the lessor of plaintiff and Stewart, whereby the said suit was compromised, which is in the following words, viz:

"Articles of agreement made and entered into between John Stewart, of the county of Wilson and State of Tennessee, of the one part, and James Walton, of the county of Sumner and State aforesaid, witnesseth: Whereas, John Stewart filed a bill in the chancery court for the fourth circuit, at Franklin, against James Walton, Thomas Walton, Edward Bradley, William New, Everett Mitchell and Tazewell Mitchell, for a certain tract of land lying on Cedar creek, containing one hundred and ten acres, formerly the property of Seth P. Pool, and on which said Stewart now lives, and on which there has been a saw-mill, and the said Stewart and James Walton are the only persons concerned in said suit; and whereas, this our compromise hath this day taken place, which is to be of record, as soon as convenient, in the following manner, viz: the said John Stewart is to have full possession of all the land contained in said survey, as will more fully appear by the bond given to Seth P. Pool by William New, reserving to the said James Walton the one-half of the mill seat and the old materials of which said mill was built, and also the privilege of a small lot of ground on the point of the bluff above the spring to build a house on; and the said Stewart and Walton doth further agree to rebuild said mills jointly in the following manner: the old materials are to be used, and said Walton is to furnish two pair of mill-stones three feet and a half in diameter at his own expense, and all the expenses attending the said buildings are to be equal. In testimony whereof we have hereunto set our hands and seals this 3d November, 1827.

JAMES WALTON, [Seal.]

JOHN STEWART, [Seal.]"

The proof shows that the land in controversy had been sold by William New to Seth P. Pool, to whom he executed

a title bond. Pool assigned said bond to Edward Bradley, from whom Walton claims. Stewart alleged in his bill that he had purchased the land from Pool, and that Bradley had been his security for the payment of the purchase money; and to secure him the title bond was assigned to him by Pool to be held in trust for Stewart. Both Stewart and Walton were in possession of part of the land at the date of the above articles of compromise. Among other things the court charged the jury, "that if this agreement was respecting the land sued for it gives the right of possession to Stewart; that Stewart could not be considered Walton's tenant, but Stewart, by this written agreement with Walton, had a right of possession as against Walton during his life at least, and it was an interest or right which was not determined by Stewart's moving off the lands, but it was an interest or right which he could sell; that although Walton had no deed himself, and of course no legal title at the date of this agreement, yet the title he acquired afterwards inured to the benefit of Stewart and those coming in under him, and it would estop Walton from claiming the land except against those coming in adversely to Stewart."

NASHVILLE,
December, 1839.

Walton
v
Newson.

We think the court erred in the above direction to the jury in the construction which is given to the articles of compromise. Walton, in that agreement, does not purport to convey anything to Stewart. Nothing is said about the title of the land. Neither of them had the legal title, and both claimed to be entitled in equity, each having possession of part of the land; thus circumstanced; they say in the article that Stewart is to have full possession of all the land in controversy, reserving to Walton half the mill seat. Whether a court of chancery would construe these words, "full possession," to be a relinquishment of all Walton's claim to the land is a question we need not decide. They certainly do not convey anything to Stewart; and it is questionable whether they were intended to mean more than to settle the pending controversy, without affecting the rights of either party. At any rate this article of compromise does not purport, nor by any possible construction can it mean, a conveyance of an estate from Walton to Stewart; and consequent-

NASHVILLE,
December, 1839.

Walton
v
Newsom.

ly, when Walton afterwards was clothed with the legal title and commenced this suit he was not estopped by this article of compromise from prosecuting it to judgment against Stewart or any one claiming under him.

The defendant's counsel insists that the plaintiff does not show by the record that the title is in him, because he has not produced the will of William New to show that Sarah New and John T. New are his executors. The defendant introduced and read in evidence a deed from these same persons, as the executors of William New, and we think he has thus admitted they were such. The bond for a title to this land, executed to the Waltons by William New in his lifetime, was proved and registered, and by the act of assembly the executors were authorized to make the conveyance. It is insisted by the plaintiff's counsel that the article of compromise constitutes Stewart a tenant of Walton, and that he is estopped from setting up an adverse possession against Walton, his landlord; and that Newsom, the defendant, having derived his possession from Stewart, is estopped in like manner. The principle here contended for would be true if Stewart had in fact been Walton's tenant; but such he clearly was not before this article of compromise, and there is no expression used in the instrument that hints at an acknowledgment of Walton's title. When it is said Stewart shall have full possession, Walton thus relinquishing his partial possession, we cannot infer that Stewart thereby agreed to hold such possession under Walton's title. It is presumable that as he claimed title to the land himself when Walton relinquished to him "full possession," he would hold possession by virtue of his own claim of title. We think, therefore, that this instrument does not constitute Stewart the tenant of Walton, nor does it convey to Stewart any estate from Walton; and hence neither party is estopped by it.

Let the judgment be reversed and the cause remanded for another trial.

IRWIN vs. PLANTERS BANK.

NASHVILLE;
December, 1839.Irwin.
v
Planters Bank.

Courts of chancery take jurisdiction to give relief in cases of lost or destroyed bonds, notes, &c., on the ground of being able to furnish more adequate indemnity to the defendant than courts of law.

Where the issuance of certain bank notes, alleged to have been destroyed by fire, were not directly traced to the bank of which they purported to be the notes, and no description of them by date or letter given: Held, that it was not possible to give the defendants adequate indemnity, and therefore no relief could be decreed to complainant.

On the 22d March, 1839, Joseph M. Irwin, a citizen of Davidson county, filed his bill in the chancery court at Franklin, in the middle division of the State, against the president and directors of the Planters Bank of Tennessee. The bill alleges: 1st. That complainant, Joseph M. Irwin, was the owner of the steamboat Cumberland; that the boat by accident at the wharf of New Orleans, in the year 1838, took fire and was consumed; that in it was also consumed six notes, issued by the president and directors of the Planters Bank of Tennessee, each for fifty dollars, signed by M. Watson, president and N. Hobson, cashier, and made payable at the bank in Nashville; the numbers and dates of said notes were not known. 2d. That demand of payment of said notes had been made at the bank in Nashville, and that the payment of them was refused. 3d. That the complainant tendered through the court such indemnity to the defendants as the court should direct against the ultimate return of said notes to the bank for second payment.

The defendants in their answer, under the common seal of the corporation, sworn to by M. Watson, president, state that they know nothing in regard to the destruction of the notes, and call for proof; that it is true that the affidavit of Andrew Hamilton, the clerk of the steam-boat Cumberland at the time it was burnt, was laid before the president and directors of the institution; stating that six notes, issued by the Planters Bank, payable at Nashville, and signed by M. Watson, president, and N. Hobson, cashier, were consumed by the burning of said boat, but that said affidavit did not state the number or dates of said notes, to whom they were

NASHVILLE,
December, 1839.

Irwin
v
Planters Bank.

made payable, nor any description whatever by which the notes could be identified by the bank, and that they refused the payment thereof; that the defendants had issued six thousand eight hundred notes for fifty dollars each, payable at Nashville, of different dates, and of different marks, numbers and letters, and payable to different persons or bearers, all signed by M. Watson, president, and Nicholas Hobson, cashier, and that with so vague a description they could not pay them without subjecting the institution to the grossest frauds; that said notes might have been stolen or otherwise saved from destruction in the conflagration; that the bank, for the purpose of defeating frauds and doing justice, had kept a register in which a specific description of all notes issued were marked down; but that under the existing circumstances it was not possible for the complainant to furnish the bank with a safe and adequate indemnity against the return of said notes for second payment, as the complainant could give no adequate description of the notes alleged to be consumed by which the same could be described in a bond of indemnity, &c. &c. There was a general replication filed; the allegations of the bill were fully proven but the notes were not identified by the proof further than as stated in the bill.

On the 12th day of November, 1839, the cause came on to be heard before chancellor Bramlett; he decreed that the complainant recover of the defendant the sum of three hundred dollars, with interest from the time of the filing of the bill, and that complainant pay the costs of the suit and give the defendant a bond with real security, to be approved by the clerk and master, that if it shall appear, upon the winding up the concerns of the bank, that said six notes or any of them were not destroyed, but shall come against the said bank, and the bank shall be compelled to take them up, that the complainant shall refund to the bank the said sum of three hundred dollars, or so much as shall come back, with interest from the time interest is calculated in the decree &c. From this decree the defendants appealed.

Cook, for complainant. 1. The jurisdiction in this case in

equity is founded upon that head of equity called accident, and is because by accident the party is deprived of his action at law, or is embarrassed in his legal remedy. Cooper's Eq. 129, 130: 9 Ves. 400, 407: 7 Ves. 19, 20: 7 Ves. 249, *Kemp vs. Pryor*: 1 Story's Eq. 100 to 105: *Davis vs. Dodd*, 4 Price, 170. The jurisdiction attached at first as to bonds, because profert could not be made. The jurisdiction being established as to them it was afterwards extended to notes and bills of exchange. 1 Story, 101, note: *ex parte, Greenway*, 6 Ves. 812: 2 Sim. 285: 3 J. J. Marshall, 73: 5 Monroe, 252: 3 J. J. Marshall, 300: 4 Rand. 541: 2 Bibb, 556: 3 Bibb, 528: *Campbell vs. Sheldon*, 13 Pick. 8: 2 Harrison's Dig. 68. By our law profert is as necessary in declaring on a note or bill of exchange as on a bond; and therefore the ground of jurisdiction in both cases stands upon the same principle. No action at law could be maintained in this case, because the notes cannot be described by date or by number; or if described, could not be sworn to as to date or number. The remedy in equity is more beneficial to the defendant than at law, because at law an affidavit of loss is sufficient; in equity the complainant must prove the loss or destruction alleged in his bill.

NASHVILLE,
December, 1834.
Irwin
v
Planters Bank.

2. The complainant tenders indemnity to the defendant against loss. The indemnity which a court of law could take would be limited to one point, to wit, that the notes should not come against the bank. It is true, the evidence of the destruction of the notes and that they were notes issued by the Planters Bank being as clear as any fact can be made by human testimony, the indemnity required in this case should be slight, yet in a court of equity an indemnifying bond could be taken which would embrace any case that could arise. The bond could be so shaped that if it subsequently appeared that the witness proving the loss had perjured himself, as if the boat was not burnt or no notes were in the desk or the notes were taken out by the witness or by other persons, a recovery could be had. Indemnity might also be given that at the winding up the affairs of the bank six fifty dollar bills should not come against the institution.

NASHVILLE,
December, 1839.

Irwin
v
Planters Bank.

Campbell, for defendant, contended that courts of chancery could not give relief in cases of alleged loss of bonds or other instruments of writing except in those cases where they could provide amply for the safety of the debtor at the time they were enforcing payment of the bond or writing. He took the safety of the debtor to be the governing principle in such cases. In this case thousands of notes such as are described in the bill of complainant have been issued by the bank, distinguished from each other only by numbers or by less important distinctions. The complainant does not attempt to describe the bills in such a way as to distinguish them from six thousand others. It is not possible in such a case to give an adequate indemnity. Therefore this court should not act.

When the defendants issued these notes it became a part of the contract that the holder of them could receive payment therefor upon condition that he delivered them up to the bank. Byles on Bills, 213. The defendants did not stipulate to pay them upon any other condition than that of delivery of them; yet the defendants are now requested to dispense with this condition of their contract, and receive in lieu thereof the affidavit of some one that the notes are destroyed. This is an unauthorized variation of the contract of the parties which, if sustained, would lead to the most extensive frauds upon all the banking institutions of the State. If a court of equity, on the ground of accident, by the exercise of her extraordinary powers, should declare that the defendants should take in lieu of the presentation of the notes testimony of their destruction, still such a power should not be used in any case where the complainant could not place the defendant in as good a condition as if defendant had the possession of the note or notes. This is not possible in the present case.

Mr. Campbell cited and commented on the following authorities: *Davis vs. Dodd*, 4 Taunton, 608; 7 Barn. and Cress. 90; 9 D. and R. 860; *Pierson vs. Hutchison*, 2 Camp. 211; 6 Esp. 126.

REESE, J. delivered the opinion of the court.

NASHVILLE,
December, 1839.

Irwin
v
Planters Bank.

This suit is brought to recover from the defendants the value of six fifty dollar notes, which were the property of the plaintiff, and which are alleged to have been issued by the defendants, and to have been destroyed on board the steamboat Cumberland when that boat was consumed by fire at New Orleans in 1838. There is in the bill no description of the notes by date, number or letter.

The defendants allege in their answer that they have no knowledge or belief on the subject of the notes, or their loss or destruction; that they keep a register of the notes issued by them, specifying the dates, numbers and letters, and to whom payable; and that they have issued upwards of six thousand of the value of fifty dollars each, of varying dates, numbers, and letters, some made payable to bearer and some to individuals, and they could not safely pay claims such as that of the plaintiff without indemnity; and that from the number of notes issued by them of the same amount, they could not, without a specific description of the notes alleged to have been lost, be indemnified. There is but one witness, the clerk of the boat at the time of its destruction. He states that he had locked up in the desk in the clerk's room six fifty dollar notes, signed by the president and cashier; that he does not remember the dates, numbers or letters, for he did not notice them very particularly; he believes the signatures to have been genuine; has deposited notes in the bank and had received notes from the bank, and is acquainted with the hand-writing of the president and cashier. As to the loss and destruction, he says he removed the iron chest, and before he could return to remove the desk he was intercepted by the fire, and the desk and its contents were consumed with the boat. Two questions have been discussed in the present case: first, as to grounds of jurisdiction upon which a court of equity proceeds in granting relief in cases of lost bonds and other instruments. We take it that the jurisdiction in chancery had its origin in the fact that as at law profert must have been made, and in case of a lost bond could not be made, the court interposed on

NASHVILLE,
December, 1839.

Irwin
v
Planters Bank.

the ground of the accident; and when afterwards courts of law permitted the profert in such cases to be dispensed with, courts of chancery doubted whether courts of law, according to the course of their proceeding, could legally give indemnity at all, and if they could, whether they could make that indemnity adequate and ample; and they retained and continued to exercise the jurisdiction upon that ground. We have no doubt of our jurisdiction in a case of this description in general; but the present ground of that jurisdiction, the power to grant indemnity when necessary, is said, secondly, practically to have failed in the present case; and that we think is so. The indemnity proposed by the chancellor, namely, that if, upon winding up the affairs of the bank as many as six fifty dollar notes should not be missing, is upon the slightest reflection manifestly illusory. But it is said as the notes were destroyed no indemnity is necessary; and this is true, if the notes were certainly genuine, and certainly destroyed. Here the bank instead of having the notes inspected by its officers to attest them genuine, is asked to rely upon the judgment of a stranger casually exerted and it may be imperfectly remembered; instead of having the notes delivered up to them, they have to rely upon the same testimony for the fact of their destruction.

We are of opinion then that where there is no testimony clearly tracing the notes to the bank, and identifying them as having been issued by the bank, there must be such certainty of description as will enable the bank to see that it has issued such notes, and as will enable this court to extend an adequate indemnity to the defendants. We can imagine cases in which, without such specific description, the notes being certainly identified and traced to the bank, an action at law might be maintained, possibly a suit in this court; but this case presents neither the one aspect nor the other which we have supposed necessary to ground the relief. We therefore dismiss the bill, but without costs.

NASHVILLE,
December, 1833.RICHARDSON vs. THOMPSON, *Administrator.*Richardson
v
Thompson.

It is a rule of both law and equity that the terms and extent of an agreement under seal shall not be enlarged or diminished, contradicted or varied by parol proof.

The exceptions which have been made to this general rule are of doubtful policy, and the court will not extend them.

A reversion after the determination of a life estate cannot be created by parol in a case of a conveyance of slaves purporting to be absolute.

Samuel Richardson, a citizen of Gibson county, Tennessee, filed this bill in the chancery court of M'Minnville, in the middle division of the State, on the 5th of December, 1837, against James P. Thompson, the administrator of Thomas Hopkins, deceased, praying that certain slaves, to wit, Jesse, Amy, Fielding, Shadrach, Letitia, Sally, Nancy, Celia and Jacob, and their increase, twenty-two in number, be decreed to be delivered up to him by the administrator aforesaid to be emancipated.

It appears that in the year 1814, Richardson, then a resident of the county of Rutherford, Middle Tennessee, being hostile to slavery and averse to the holding and management of slave property, conveyed by bill of sale dated the 12th January, 1814, the eight negroes above specified to Thomas Hopkins, his brother-in-law, then a resident of Warren county, Tennessee. The bill of sale was absolute on its face, acknowledging the receipt of twenty-six hundred dollars for the sale and delivery of said slaves to Hopkins, and warranting the title of said slaves to Hopkins against himself, his heirs, administrators, executors and assigns, and against the claim of all other persons whatsoever. It also appears that Hopkins sold one of the slaves in his life-time, and that on the 3d day of October, 1825, he become embarrassed and conveyed one family of the slaves mentioned in the first bill of sale back to Richardson, who took them with him to the western district, being nine in number. The instrument by which they were re-conveyed obligated Richardson to pay to Hopkins four thousand five hundred dollars for the nine slaves three years from the date of the conveyance, with the ex-

NASHVILLE,
December, 1839.

Richardson
v
Thompson.

press understanding that said sum might be discharged by the re-delivery of the slaves to Hopkins at any time he might demand them. In the course of the time specified in the deed this instrument was taken up by the return of seven of the slaves, Richardson retaining two of them. In 1836 Hopkins died intestate, having in his possession the said slaves, with the exception of one sold and two left in the possession of Richardson, in Gibson county. James P. Thompson obtained letters of administration upon his estate from the county court of Warren.

The complainant alleges in his bill that his brother-in-law was a man of known humanity, considerable wealth, advanced in life, and that he had no children; that under such circumstances, he being opposed to slavery and averse to holding them, yet being unable to surrender all his means of worldly support, he received from Hopkins the sum of sixteen hundred dollars for said slaves, and executed to him the bill of sale above mentioned upon the express condition and trust that said Hopkins should keep them together, not sell them, and provide at or before the death of him, said Hopkins, that said slaves should be emancipated or re-conveyed to him or to his representatives; that Hopkins had promised him to re-purchase the slave sold, but had died without so doing or making provision for so doing, or for the emancipation of the others mentioned in the conveyance; and that the administrator had refused to emancipate them.

The answer denied the condition and trust alleged in the bill of complainant, and claimed the slaves as the absolute property of the legal representatives of the deceased. To this answer the complainant filed a replication. The proof taken was of an unsatisfactory and inconclusive nature in regard to the verity of the parol trust alleged in the bill and denied in the answer. Hugh Robertson testified that after the bill of sale was executed Hopkins stated to him that he had "Richardson's negroes;" that it was generally understood in the neighborhood that Hopkins was to emancipate them at his death; and that Hopkins at one time stated to him that he had returned "Richardson's negroes." There was

other testimony tending to show that Hopkins held them some fifteen or twenty years as his own.

NASHVILLE.
December, 1839.

Richardson
v
Thompson.

After several continuances by the complainant, at the July term, 1838, the cause was set for hearing by the defendant's solicitor. The complainant moved the court, chancellor Bramlett presiding, that the cause be continued and opened for further proof, and laid his grounds in an affidavit which set forth that the fact of the trust could be clearly and fully proved by the individual therein named; and that he had discovered his testimony at so late a period that he could not have the same in readiness. The court refused to continue the cause; and being of the opinion that the trust alleged in said bill could not be raised or sustained by parol proof, dismissed the bill.

The complainant appealed to the supreme court.

Laughlin, for complainant.

Ridley, for defendant, cited Nich. and Car. 350, act of 1801, ch. 25: 2 Black. Com. 398: 2 Kent, 2d ed. 352: 2 Yerger, 585: *Payne vs. Lassiter*, 10 Yerger, 507.

REESE, J. delivered the opinion of the court.

The bill in substance alleges that in 1814 the complainant, by an absolute bill of sale, for the consideration of sixteen hundred dollars paid to him, although the bill of sale states a consideration of two thousand six hundred dollars, conveyed to the intestate of defendant certain negroes; that the sale was in fact only for the life of the intestate, he having agreed at the time of the sale that he would emancipate the negroes during his life or at the time of his death, or in default thereof they should return to and re-vest in the complainant upon the death of intestate; and the bill prays that the negroes may be decreed to be surrendered to the complainant for the purpose of being emancipated. The answer affirms the belief of the defendant that the consideration stated in the bill of sale was paid to the complainant; that it was the full and adequate value of the negroes at the time of the sale, and that the sale was absolute; denies all knowledge of the

NASHVILLE,
December, 1839.

Richardson
v
Thompson.

alleged condition or limitation, and asserts an utter disbelief of its existence. The cause remained eighteen months in a state for taking testimony when it was set for hearing, and application was made to the chancellor on the part of complainant to open the cause for further testimony, and an affidavit filed stating that the allegations of the bill could be established by the testimony of a witness named. The chancellor, however, refused the motion, and on the hearing dismissed the bill, and the complainant has prosecuted his appeal to this court.

We have not deemed it necessary to consider whether upon the ground stated in the affidavit, after the delay which had occurred, the chancellor ought to have opened the case for further testimony. We should in any case enter with much reluctance upon a supervision over the exercise of the legal discretion of the chancellor touching such a question. We have considered this case as if demurrer had been filed to the bill, and stripping the question of all that is said on the subject of emancipation, which is really foreign to it, for the controversy is about the title to the property, and the aspect in which the case presents itself, is an attempt to show by parol testimony that a conveyance absolute on its face was for life only. This attempt is met by the maxim and general rule, early adopted and recognized alike in courts of equity and courts of law, that the terms and extent of an agreement under seal shall not, by the admission of parol proof, be contradicted or enlarged, diminished or varied. This rule was adopted upon the principle that the contracts of parties, deliberately written and solemnly authenticated by their seals, can safely be evidenced and perpetuated only by such instruments themselves; and that to permit the enlargement, diminution or change of their terms, to be made out by the frail and treacherous recollections of witnesses, would be to make the instruments themselves useless, the rights intended to be secured by them uncertain and doubtful, and would furnish a strong temptation and incentive to perjury and fraud. The rigor, however, of the rule has been in many cases relaxed; for it was found that under the protection of the rule itself the fraudulent might gain ad-

vantages, and that in the formation of contracts, however solemn, the necessitous would yield to oppression, and the ignorant and rash blunder into mistake. So parol testimony came to be heard to vary the terms of an instrument upon the ground of fraud, accident or mistake; and so also to guard against and prevent usury, absolute conveyances were allowed to be shown to be mortgages and security for money. The cases, however, upon these exceptions to the general rule, present a most vexed and perplexing branch of legal learning, the precise limits to the exceptions in application to particular cases contracting or enlarging according to the peculiar cast of thought or state of legal metaphysics of each individual judge; so that it may well be doubted whether the interest of society, and the honor of the law as a science, claiming a reasonable degree of certainty, would not have been alike promoted by a rigid adherence to the severe simplicity of the general rule.

We are admonished by these considerations not to go beyond the distinct limits of the exceptions which have already been created by the judgments of the courts in the decided cases. The present is a case falling within none of those exceptions. It is an attempt to create a reversion by parol after the determination of a life estate, in a case of a conveyance which purports to transfer the absolute title to the property in fee. To permit this would not only open a door to fraud and perjury, but it would render insecure and doubtful our most solemn assurances, and the property of all would depend not upon seals and parchments but upon the forbearance of the unscrupulous and the corrupt.

We entertain no doubt, therefore, that the decree of the chancellor is correct, and it is accordingly affirmed.

NASHVILLE.
December, 1839.

Richardson
v
Thompson

NASHVILLE,
December, 1839.

Robinson

v
Mayor, &c.

ROBINSON vs. THE MAYOR AND ALDERMEN OF FRANKLIN.

The by-law of the town of Franklin, prohibiting all persons from retailing spirituous liquors within the limits of the corporation under the penalty of two hundred and fifty dollars, unless the person so desiring to retail spirituous liquors should obtain a license from the corporation for one year by the payment of one hundred dollars, was in direct conflict with the laws of the State, and therefore void.

On the 19th day of May, 1836, the Mayor and Aldermen of the town of Franklin in the county of Williamson, instituted an action of debt against Thomas L. Robinson in the circuit court of said county, and at the July term, 1836, the plaintiffs filed their declaration in the following words:

"The Mayor and Aldermen of the town of Franklin, by attorney, complain of Thomas L. Robinson, who is summoned to answer the said Mayor and Aldermen of the town of Franklin of a plea that he render to them the sum of two hundred and fifty dollars, which he owes to and from them unjustly detains; for that whereas, by an act of the general assembly of the State of Tennessee, passed in the year 1815, ch. 3, entitled an act to incorporate the town of Franklin in the county of Williamson, it was among other things enacted: "Sec. 1. That the town of Franklin, in the county of Williamson, and the inhabitants thereof, are hereby constituted a body politic and corporate by the name of the Mayor and Aldermen of the town of Franklin, and shall have perpetual succession, &c. Sec. 2. That the corporation aforesaid shall have full power and authority to enact and pass such laws and ordinances necessary to preserve the health of the town, prevent and remove nuisances, &c. to impose and appropriate fines, penalties and forfeitures for the breach of the by-laws or ordinances, to lay and collect taxes for the purpose of carrying the necessary ordinances into operation for the benefit of said town, to regulate and restrain tippling houses, and pass all laws and ordinances necessary to carry the intent and meaning of this act into effect." And the said Mayor and Aldermen of Franklin aver that thus having power and authority to pass laws and ordinances for the purposes aforesaid, as specified in said act, on

the twenty-first day of November, 1835, by virtue of said power on them so conferred, passed, among other things, the following law or ordinance: "Be it enacted by the Mayor and Aldermen of the town of Franklin, That it shall be the duty of the owner of each tavern, grocery, confectionary or other house, or of any person or persons intending to retail spirituous liquors within the limits of said corporation, before, he, she or they proceed to retail spirituous liquors within the limits of said corporation as aforesaid, to apply to the recorder and obtain a license from said corporation for the term of one year, and pay to the said recorder, for the use of the corporation, a tax of one hundred dollars, and the further sum of fifty cents for granting such license; which sum of one hundred dollars is hereby declared to be the tax on each retailer of spirituous liquors within the limits of said corporation for each and every year; and if any person or persons shall proceed to retail spirituous liquors without having first obtained license therefor as aforesaid, such person or persons so offending shall forfeit and pay the sum of two hundred and fifty dollars, to be recovered before any jurisdiction having cognizance thereof, in the name of the Mayor and Aldermen of said corporation, for the use of said corporation;" which last mentioned act has been duly published. And said plaintiffs aver that the said Robinson, being at the time of the passage and promulgation of said last mentioned act, and from thence up to the time of bringing this suit, the owner and occupier of a certain tavern in the town of Franklin, called the Franklin Inn, not regarding said law of said corporation nor his duty as a citizen of said corporation, on the — day of March, 1836, and at divers other times and days between the passage and promulgation of said law and the time of bringing this suit in Williamson county, in said tavern, within the corporate limits of the town of Franklin, did retail and sell spirituous liquors, for money and other valuable things, to divers good citizens of the State of Tennessee, and more especially to ———, without having paid the one hundred dollars tax, &c. and without having obtained

NASHVILLE,
December, 1839.

Robinson
v
Mayor, &c.

NASHVILLE,
December, 1839.

Robinson
v
Mayor, &c.

the license required by said law of said corporation. Wherefore, by force of the statute aforesaid, and by virtue of said law of said corporation made in obedience thereto, the said defendant has forfeited for his said offence or offences the sum of two hundred and fifty dollars; and thereby, and by force of said statute and said law of said corporation, an action hath accrued to said plaintiffs to demand and have of and from said defendant the said sum of two hundred and fifty dollars so forfeited as aforesaid; yet the said defendant, though often requested, hath not paid said sum of two hundred and fifty dollars above demanded, or any part thereof, but wholly fails and refuses to pay the same, to the damage of plaintiffs, fifty dollars."

To this declaration the defendants pleaded, first, *nil debet*; secondly, that he sold the spirits by leave and license of the Mayor and Aldermen. Issues were joined on both these pleas, and at the March term, 1838, they were submitted to a jury, who, upon the testimony introduced, returned a verdict for the penalty of two hundred and fifty dollars. A motion was then made to arrest the judgment of the court, but this was overruled and judgment rendered. The defendant obtained an appeal in the nature of a writ of error to the supreme court.

Meigs and Marshall, for plaintiff in error. The power to regulate and restrain does not include the power to license, and in default of taking a license, to impose a penalty. Under this power the Mayor and Aldermen may prescribe rules and impose restrictions according to and within which the right to retail spirituous liquors allowed by law should be exercised; but they could not prohibit the retailing of spirits, or impose a penalty for retailing without their license. If a man have a county license under the acts of 1831, ch. 80, and 1832, ch. 34, the Mayor and Aldermen might regulate and restrain him in using that license, but could not prohibit him from using such license without their license also. If he have no such license, that circumstance does not confer upon them a power which the words of their charter will not bear.

Their license would not authorize him to retail spirits without a county license.

NASHVILLE,
December, 1839.

Robinson
v
Mayor. &c.

The repeal of the tippling house laws by the act of 1837-9, ch. 120, is a pardon of all offences under the law repealed, unless there is a saving clause in the repealing act. The rule is that no man can be punished by the infliction of a fine or forfeiture unless the law inflicting such fine or forfeiture is in existence at the time of the conviction and judgment. 2 Stark. 614, 619; Dwarries on Statutes, 32.

Alexander, for defendants in error. The act of the general assembly of 9th October, 1815, incorporating the inhabitants of the town of Franklin, conferred upon the Mayor and Aldermen of said corporation the power to regulate and restrain tippling houses. This is a substantive grant of power to the corporate authorities by the legislature, and is a portion of the laws of the land. The mode of regulating tippling houses within the limits of the corporation and the extent of the restraint to be imposed upon them was intrusted to the discretion and judgment of the corporate authorities. The fact that these establishments became in the towns, by their numbers and the disorderly conduct practised at them, great nuisances, rendered the vesting of this power in the corporation necessary to the quiet and good morals of the citizens.

The same act conferred upon the Mayor and Aldermen the power "to lay and collect taxes for the purpose of carrying into effect the necessary measures for the benefit of said town. It also confers upon them the power "to impose fines, penalties and forfeitures for the breach of the by-laws and ordinances" of the corporation.

It is evident that the taxing power and the power to impose fines, penalties and forfeitures are fit and appropriate instruments in the hands of the corporate authorities to regulate and restrain tippling houses. Taxes, fines and penalties are the instruments most commonly used by all corporations in the regulation and restraint of practices and avocations deemed detrimental to the interests of the body corporate, and are regarded by them as measures of a milder character

NASHVILLE.
December, 1839.

Robinson
v
Mayor, &c.

than corporal punishment. The Mayor and Aldermen of Franklin laid a tax of one hundred dollars on all persons who wished to retail spirituous liquors, and in the event that any one sold liquors without the license procured by the payment of the hundred dollars, they imposed upon him a penalty of two hundred and fifty dollars, to be recovered for the use of the corporation. They had a right to tax privileges as well as persons and property, (see sections 28 and 29 of article 2 of the constitution,) as the legislature had, in pursuance of the constitution, vested in them the general authority to lay and collect taxes for the purpose of carrying into effect measures necessary for the benefit of the town. It is clear that the license was nothing more than the evidence that the tax levied by the corporation was paid. The tax did not, in fact, amount to a prohibition, as many paid the tax and retailed spirits. The legislature had made the right to retail spirituous liquors a privilege, and had taxed those who exercised the privilege. It cannot be said that it was not necessary for the Mayor and Aldermen to lay and collect a tax of one hundred dollars on each person who exercised this privilege, for the purpose of carrying into effect public works; nor can it be said that such a tax was not necessary to restrain the increasing number of these establishments, and the vices and disorders attendant upon them. If they had the power to levy the tax, it follows that they had the right to enforce the payment of it by forfeiture. This course is no less usual in the ordinances of all corporations than in general legislation. See act of 1799, ch. 10, sec. 3: N. and C. 507.

If this by-law of the corporation be repealed by the act of the 26th January, 1838, entitled "an act to repeal all laws licensing tippling houses," still the penalty previously incurred by Robinson under and during the existence of that by-law is not repealed or affected thereby. *Bennett vs. The State*, 2 Yerg. 472: 6 Bac. Ab. 372: Dwarris on Statutes, 675: 9 Law Lib.

GREEN, J. delivered the opinion of the court.

This is an action of debt to recover from the plaintiff in error two hundred and fifty dollars, the penalty imposed by

said corporation for a breach of its by-laws. The by-law in question was passed the 19th day of August, 1833, and is as follows:

NASHVILLE,
December, 1836.

Robinson
v
Mayor, &c.

"Be it enacted by the Mayor and Aldermen of the town of Franklin, That it shall be the duty of the owner of each tavern, grocery, confectionary or other house, or any person or persons whatever intending to retail spirituous liquors within the limits of said corporation, before he, she or they proceed to retail spirituous liquors within the limits of said corporation as aforesaid, to apply to the recorder and obtain license from the said corporation for the term of one year, and pay to said recorder, for the use of said corporation, a tax of one hundred dollars, and the further sum of fifty cents for granting such license, which sum of one hundred dollars is hereby declared to be the tax on each retailer of spirituous liquors within the limits of said corporation for each and every year; and if any person or persons shall proceed to retail spirituous liquors without first having obtained a license therefor, as aforesaid, such person or persons so offending shall forfeit and pay the sum of two hundred and fifty dollars, to be recovered before any jurisdiction having cognizance thereof, in the name of the Mayor and Aldermen of said corporation, for the use of said corporation."

There was a verdict and judgment for the plaintiffs in the circuit court of Williamson county, and a motion in arrest of judgment, which was overruled. The defendant appealed in error to this court. The question for consideration now is as to the validity of the by-law of the corporation. A corporation can pass no by-law inconsistent with the constitution and laws of the State. Ang. and Ames on Corp. 182, 188: 2 Bac. Ab. 9.

At the time this ordinance passed, and up to the period of its violation by the plaintiff in error, the laws of the State permitted persons who might obtain license as prescribed by those laws to retail spirituous liquors. Consequently individuals who had obtained a license to retail spirituous liquors under the State law could not, by an act of the corporate authorities of Franklin, be prohibited from retailing those liquors within the limits of that town. But this by-law ex-

NASHVILLE,
December, 1839.

Robinson
v
Mayor, &c.

pressly prohibits a party from retailing spirituous liquors within the corporation under a heavy penalty, unless a license be first obtained from the corporation. It comes, therefore, in direct conflict with the law of the State, and hence is void. It makes no difference that Robinson had no license under the State laws. In that case the corporate license could not have conferred upon him the right to sell, in violation of the State law; and they had no power to impose a penalty upon a man for not obtaining a license to do that which it would have been illegal for him to do if he had obtained said license. This is not an ordinance imposing a fine for retailing without a license. Such a by-law would have been valid; it would not have contradicted, but would have been in accordance with the State law. This law imposes a penalty for selling without a corporation license; a thing they had no right to grant. If he had a license under the State law their license would confer no additional privilege, and if he had not, theirs would confer no privilege at all.

These views do not at all interfere with the right to tax, or to regulate and restrain tippling houses. Although a party may have a license under the State laws to sell, and therefore the act of selling is not a nuisance, yet he may be restrained and regulated in the exercise of this privilege so as to mitigate the evils of his trade.

We think there is error in the judgment, and therefore order that it be reversed and the judgment be arrested.

KELLY vs. HARE.

NASHVILLE,
December, 1839.Kelly
v
Hare.

If land secured by occupancy be entered by and granted to another person, without notice of a design to enter the land was given by the enterer to the occupant, the entry and grant are void for so much as the occupant had in his possession at the date of the entry.

Although the paper title of the defendant may cover land which belongs to the plaintiff, yet the plaintiff is entitled to a verdict and judgment for so much only as is in the actual possession and occupancy of the defendant belonging to plaintiff.

On the 9th day of July, 1838, Achilles Hare instituted an action of ejectment in the circuit court of Jackson county against Ritta Kelly and John J. Kelly. The defendants pleaded not guilty, and issue was joined thereupon. On the 17th day of July, 1839, the cause was submitted to the jury.

The plaintiff read to the jury an entry in the following words:

"State of Tennessee, Jackson county. Orville P. Matthews enters one hundred acres in said county of Jackson, beginning at a beech, running east and south for complement, so as to include the house and improvement where the widow Flat now lives. 2d January, 1826.

ORVILLE P. MATTHEWS, Loc'r."

The plaintiff also read a grant from the State of Tennessee to Achilles Hare, assignee of Orville P. Matthews, for one hundred acres of land, run out in conformity with the entry above set forth, and dated the 17th day of July, 1837. The plaintiff also proved that the calls of the plaintiff's grant would include the place in controversy; that the widow Flat lived within the bounds of the calls of the grant at the date of the entry by Matthews; that the place where she lived was "known notoriously" in the neighborhood at that time as the place where the widow Flat lived; and that the defendants occupied at the time this suit was brought a small field of about half an acre at the same place.

The defendants read an entry in the following words:

"State of Tennessee, Jackson county. John Johnson Kelly enters one hundred and sixty acres of land in said county on the dividing ridge between Doe creek and Roaring river,

NASHVILLE,
December, 1839.

Kelly
v
Hare.

beginning on a beech tree standing on the north side of Cave Hollow, thence running east, thence south, thence west, thence north to the beginning corner, including an improvement made by Abijah Kelly whereon the widow Flat once lived, the place called Gilbo. July, 1832.

JNO. JOHNSON KELLY, Loc'r."

This land was surveyed on the 2d day of December, 1833, and granted by the State of Tennessee to John Johnson Kelly on the 27th day of August, 1835.

The defendants proved that this grant covered all the land occupied by them at the commencement of this suit; that the place was the same where the widow Flat lived, and was "notoriously known" by the name of the place where the widow Flat lived, and was also known by the name of Gilbo. It also appeared in proof that Abijah Kelly, the father of John J. Kelly, erected a house and made some other improvements on the premises in dispute in the year 1824, and in the spring of 1825 put the widow Flat and her son in possession of them. They continued in possession under A. Kelly till February, 1826. A. Kelly always claimed a right of occupancy, and the entry was made in the name of his son, John J. Kelly at the instance and request of his father, A. Kelly. At the time Matthews made his entry upon the place, the widow Flat was in possession, holding under Kelly, and no notice was given by Matthews to the occupying claimant of his intention to enter the premises.

The honorable A. B. Caruthers, judge of the fourth circuit, charged the jury as follows:

"1. The entry of Matthews is neither vague nor special; it is indifferent and may be made certain by proof that the object called for, to wit, "the place where the widow Flat lived," was sufficiently known to identify its locality, and thus enable subsequent enterers to avoid it; if it has not this sort of specialty the grant cannot be connected with it, and the plaintiff fails.

"2. If, at the time Matthews' entry was made, Mrs. Flat was in actual possession of any portion of the premises, the grant founded on it was void as to her unless he had given her thirty days notice of his intention to enter.

"3. The extent to which it would be void seems to be determined by the supreme court in the case of ———. Prior to that determination the opinion had prevailed in the adjudications of this circuit that the act of 1824 secured to the occupant of vacant lands a right to enter one hundred and sixty acres in preference to all others who did not give him thirty days notice. The act was supposed to intend a permanent provision for priority to settlers to the same extent that the act of 1823 secured a priority for a short time; but the decision of the supreme court is understood to limit the right of the occupant to the extent of his actual improvement, and under the authority of that decision Hare's grant is valid except as to the improvement in the possession of Mrs. Flat at the date of the entry.

NASHVILLE,
December, 1839.

Kelly
v
Hare.

"4. If she was in possession for Kelly, and when she left yielded the possession to him, then he had the occupant right, and if he made the entry for his son it vested that right in his son, and his title would thus be superior to Hare's to the extent of the occupancy; for independent of any right that might arise out of the relation of landlord and tenant, the occupant might waive his right to thirty days notice in behalf of any person, and thus make the title derived from that waiver good against one who had entered without giving the notice.

"5. The defendants' counsel contend that as the improvement has never been extended since the entry of Matthews was made, and as they show a paramount title to that by virtue of occupancy, they are entitled to a general verdict of not guilty, for the reason that the plaintiff fails to show any actual possession taken by defendants of any other land included in the plaintiff's grant. If the defendants held under the grant of one hundred and sixty acres to John J. Kelly, their possession was an actual possession to the boundaries described in the grant; and if the improvement which they had enclosed and in cultivation was within the plaintiff's grant of one hundred acres, and the whole of said one hundred acres was also covered by the one hundred and sixty acre grant under which the defendants were holding and claiming the land, it was an ouster of the plaintiff as to the

NASHVILLE,
December, 1839.

Kelly
v
Hare.

whole of his one hundred acres, in other words, it was an actual possession adverse to that of the plaintiff, and entitles the plaintiff to a verdict for all the residue of his grant not covered by the improvement; such a possession would have barred the plaintiff's title if it had continued seven years. If the defendants were not claiming to hold the land by virtue of the grant, but were only claiming to the extent of the improvement, then it was only an ouster of the plaintiff, an actual adverse possession to that extent, and the defendants showing title to that would be entitled to a general verdict; in the absence, however, of proof to the contrary, a possessor of land holding a grant for it is presumed to hold under his own grant.

The jury returned a verdict as follows: "The defendants are guilty of the trespass and ejectment in the plaintiff's declaration mentioned," "except that part of the premises contained in the improvement which was made prior to the entry under which the plaintiff claims, which improvement is the same that existed at the commencement of this action; and as to that part contained in the improvement as aforesaid the defendants are not guilty." Judgment was entered in conformity with this verdict, from which the defendants obtained an appeal in the nature of a writ of error to the supreme court.

Cullom, for plaintiffs in error.

Hubbard, for defendant.

TURLEY, J. delivered the opinion of the court.

In this case the plaintiff in ejectment claims title to the premises in dispute by a grant from the State of Tennessee bearing date the 17th day of July, 1837, upon an entry made in 1826; the defendants by a grant to their father bearing date 27th August, 1835, upon an entry made in July, 1832. This would give the plaintiff the superior title, his entry being the oldest; but the father of the defendants was entitled as an occupant previous to the date of the plaintiff's entry to a portion of the disputed premises, of which the defend-

ants were in possession at the date of the suit. No notice of a design to enter the land was given by the plaintiff to the occupant, as is required by the act of 1823, and therefore the entry and grant thereon are void for so much as the occupant had in possession at the date of the entry. The proof shows that the defendants had not extended their possession beyond that of their ancestor.

NASHVILLE,
December, 1838.

Kelly
v
Hare.

And the question now arises upon that portion of the charge of the court below which says, "that if the defendants held under the grant of their ancestor, their possession was to the extent of the grant; and that inasmuch as the statute of limitations would have perfected their title in seven years, the plaintiff would have a right to sue although they were only in the actual possession of the occupancy belonging to their ancestor." This charge is erroneous; although the statute of limitations, by its express words, makes a possession co-extensive with the boundaries of the paper title under which it is taken, yet it does not authorize a suit unless the possession is in violation of the actual rights of another; therefore, if titles conflict and the person in possession has the legal right to that upon which he has his foot, no suit can be brought against him although his title may cover land which belongs to another; the only remedy in such a case is for the person who has the legal right to take the actual possession, which stops the operation of the statute. The judgment of the court below will therefore be reversed, and the case remanded for further trial, when the judge will instruct the jury that if the defendants were not in the actual possession of more of the land in dispute than the occupancy of their ancestors a verdict must be found in their favor.

NASHVILLE,
December, 1839.

JOHNSON *vs.* MITCHELL, *et als.*

Johnson
v
Mitchell.

M. Currie having conveyed a large portion of her property to her children and her step-children, and they becoming offended thereat, the matters in dispute were referred to arbitration; the arbitrators awarded six hundred dollars to the step-children at the death of M. Currie, and that bond should be given to them by the sons-in-law of M. Currie for the payment of said sum; the sons-in-law gave their bonds accordingly; thereupon, Mrs. Currie executed a deed in which, after reserving to herself a life estate in the property she then held, "she threw it into the hands of her sons-in-law" to meet the award at her death, and distribute the balance amongst her children: Held, that this deed vested a remainder in the sons-in law in trust to indemnify themselves against loss by their suretyship and in trust for distribution, and was therefore irrevocable.

Mary Currie, in the year 1815, then a resident of the State of North Carolina, a widow, of advanced aged, had one son, Wilson Currie, and three daughters, who had intermarried with W. Mitchell, John Love and James H. Bowman; she had also six step-children. She transferred to her children at this date, by bill of sale, the greater portion of her property. This produced some dissatisfaction on the part of her step-children, and a controversy arose between the step-children and children. The portions conveyed to her children amounted to about the sum of one thousand two hundred dollars to each, reserving to herself two negro girls, Milla and Flora, and some articles of personal property of small value. The matters in dispute were referred to arbitrators, who awarded that the sum of six hundred dollars should be paid to the six step-children at the death of Mrs. Currie, and that security should be given for the ultimate payment of this sum. Accordingly, Mitchell, Bowman and Love gave their obligations for the payment of the said sum of six hundred dollars at the death of Mrs. Currie. Mrs. Currie then executed the instrument which is fully set forth in the opinion of the court, affirming the previous gifts to her children, reserving to herself Milla and Flora during her natural life, and the balance of her property not transferred; and with a view to meet "the award of the arbitrators," declaring that she "threw into the hands of" Bowman, Mitchell and Love, the negroes and property

reserved, who were "requested" to discharge the debt of ^{Nashville,} six hundred dollars to the step-children at her death, and ^{December, 1839.} to distribute the balance, if any, equally amongst her children. Shortly after the execution of this instrument she removed, with her son-in-law Mitchell, to Rutherford county, State of Tennessee, and continued to reside with him till the year 1817, when she left the residence of Mitchell and went to the house of her son, Wilson, in the county of Maury. Prevailed upon, as she subsequently stated, by the importunities of Wilson Currie, she executed, on the 18th day of October, 1818, the following deed:

Johnson
v
Mitchell.

"This indenture, made this 18th day of October, 1817, between Mary Currie, of the State of Tennessee and county of Maury, of the one part, and Wilson Currie of the other, witnesseth: that in consideration of the friendship, good will and affection which I bear to my son, I do give, and by these presents do covenant, convey and confirm to said Wilson Currie all of the surplus of the property yet remaining in my hands, including two negro girls, Milla and Flora, together with the money and other articles, after paying the sum of six hundred dollars at my death, which monies are due to my step-children at that time, which overplus at the aforesaid time I do warrant and defend to the said Wilson Currie against any lawful claim or claims by, through or under me, or title derived from me or my heirs. In testimony whereof I have set my hand and seal.

MARY CURRIE, [L. S.]"

This deed was duly proven and registered in the county of Maury. Mrs. Currie returned to Rutherford. In the year 1826 Wilson Currie executed a deed to William A. Johnson, reciting the deed executed to him by his mother in 1818, by which he conveyed his interest, devised by virtue of it, to said Johnson, and acknowledging the receipt of five hundred and fifty dollars therefor. William A. Johnson sold his interest for a valuable consideration to Milton Johnson, Alexander Johnson and David Whitaker, for whose use this suit was instituted. In the spring of 1835 Mrs. Currie died at the residence of Mitchell, in Rutherford, having with her all the property embraced in the deed of 1818 to

NASHVILLE,
December, 1839.

Johnson
v
Mitchell.

Wilson Currie. S. W. Hodge and Anderson Mitchell applied to the county court of Rutherford county for letters of administration, which were granted. The personal property, excluding the slaves, not being sufficient to discharge the debt of six hundred dollars and other debts, the administrators presented their petition praying the sale of the slaves to pay the debts, and also as being necessary to effect a distribution among those entitled. The slaves, Milla and Flora and two children of Milla, and other personal property, were accordingly sold under an order of the county court of Rutherford, and produced the sum of two thousand one hundred and seventy-two dollars and eighty-eight cents.

Upon this state of facts, W. Johnson, "for the use and at the proper costs" of M. Johnson, D. Whitaker and A. Johnson, filed his bill in the chancery court at Columbia, Maury county, on the 17th day of June, 1836, against Hodge and A. Mitchell, administrators of Mary Currie, deceased, against W. Mitchell, Bowman, Love and Wilson Currie, praying that all the interest of Wilson under the deed of 1818, upon settlement of the accounts of the estate and the payment of the six hundred dollars due the step-children, might be decreed to M. Johnson, A. Johnson and Whitaker.

Mitchell, Bowman and Love answered and held up the deed of 1815 as transferring the property to them in trust to pay the six hundred dollars due the step-children, and to distribute the balance amongst the heirs at law of Mrs. Currie at her death, and insisted that nothing was conveyed by the deed made in 1816 to Wilson Currie. The administrators answered and declared a readiness to pay over under the decree of the court to those entitled.

Wilson filed his cross bill, alleging that the deed to William Johnson was obtained by gross fraud and misrepresentation, and praying that it might be cancelled. This cross bill was answered and denied.

The cause came on to be heard at the September term, 1839, before chancellor Bramlett, sitting at Columbia, who, being of the opinion that the deed of the 18th of October, 1818, was testamentary in its character, ordered, adjudged and decreed the said deed to be presented to the county

court of Rutherford for probate as a testamentary paper, and that the testimony taken in this court relating to the execution of said paper, together with such other proof as might be adduced, should be heard; and that the clerk of said county court should certify the same, when proven, to the chancery court; and being of the opinion that Wilson Currie was not entitled to the relief sought, dismissed his cross bill, and ordered that the administrators account, &c. &c., and that the clerk and master report, &c. &c. From this decree the defendants appealed to the supreme court.

NASHVILLE,
December, 1839.

Johnson
v
Mitchell.

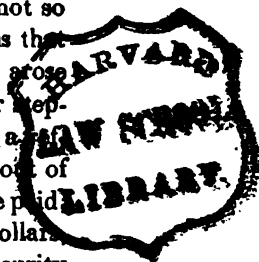
Pillow, for complainants.

Meigs and Ready, for defendants.

REESE, J. delivered the opinion of the court.

It appears from the proofs in this cause that in 1815, Mary Currie, then of North Carolina, a widow, of advanced age, having four children, one son and three married daughters, transferred to them by bill of sale the greater portion of her property, amounting in value to about the sum of one thousand two hundred dollars each. The property not so transferred consisted of two negro women. It seems that in consequence of these transactions a controversy arose between her and her children on the one side, and her step-children, six in number, on the other, to adjust which a reference to arbitrators took place, who awarded that out of the untransferred property the step-children should be paid at the death of the widow, the sum of six hundred dollars, and that for the ultimate payment of that sum security should be given presently; and accordingly Mitchell, Bowman and Love, the three sons-in-law of Mary Currie, gave their obligations for the payment at her death of the said sum of money. Whereupon the said Mary Currie executed the following very inartificial instrument, to wit:

"Know all men by these presents, that I, Mary Currie, of the county of Person and State of North Carolina, out of my good pleasure, and for reasons not necessary here to



NASHVILLE,
December, 1839.

Johnson
v
Mitchell.

mention, have thought proper to state, sanction and subscribe the following particulars: In the first place, it is my good pleasure to retain in my own hands, and to my proper and only use, the property not otherwise given in bills of sale to my children; that the thing may be better understood, the following pieces of property I claim a free and unrestrained use of during my natural life, to wit, Milla, Flora, the proceeds of any sales that have been or that may be made, either public or private: no person shall have a right or claim to act or transact my business as relating to the above particulars, without my consent or approbation. Secondly, in order to meet the award of the arbitrators who sat in Caswell county, October, 1815, composed of said Vanhook, Daniel Mitchell and Gab. Lea, as that award respects me, my step-children and my own children, I agree to throw the above pieces of property into the hands of my sons-in-law, James H. Bowman, William Mitchell and John Love, who are requested to discharge the above debt immediately after my death, and the balance, if any, to distribute equally among my own children. No part of the above property shall be applied otherwise than to the wants and support of the said Mary Currie while she lives, and after death to be faithfully and immediately applied to discharge the amount of the above award. In testimony of my approbation to the above instrument, I have set my hand and seal the day and date above written.

her

Test, JOSEPH TAYLOR,

MARY X CURRIE, [Seal.]

SAM'L McMAURY.

mark.

"N. B. All my property in my hands not immediately in use I agree to confer with and to be party with my securities in managing to the best advantage for the benefit of all; and for the satisfaction of my children I promise to consult, and by and with the consent of those concerned as my securities, only to execute my more material affairs." [Signed and witnessed as above.]

As, by a subsequent instrument, Mary Currie gave the above mentioned property to her son, subject to the payment of the award, the question arises upon the first instrument above set forth, whether it be testamentary and there-

fore revocable, or whether it constitutes an effectual and valid transfer and disposition of the property mentioned.

NASHVILLE,
December, 1839.

Johnson
v
Mitchell

In substance the instrument is, "Know all men by these presents, that I, Mary Currie, agree to throw into the hands of my sons-in-law and sureties two negro women and other pieces of property, out of which, immediately on my death, they shall faithfully pay a debt due by award to my six step-children, and for which they are sureties, and the balance of the proceeds of said property they shall equally divide among my own children; but I reserve to myself the use and enjoyment of the said property for my support during my natural life, agreeing, however, to consult with and act by the advice of my said sureties in all material affairs touching the same;" or more briefly still, "I hereby throw into the hands of my sons-in-law and sureties two negro women and other property, (they permitting me the use and enjoyment of the same during life,) at my death, to indemnify themselves as my sureties, by paying the debt then due to my step-children by an award, and to divide the balance among my children, namely, their wives and my son." The above is a transaction *inter vivos*, and the legal effect of it is to reserve a life estate to the grantor, and to vest a remainder in the sons-in-law in trust, to indemnify themselves as sureties for the award by paying the same, and in trust to pay the balance to their wives and brother-in-law, the children of the grantor. That a life estate may be reserved and a good remainder thus created in slaves, is determined upon full consideration and deliberate argument in the case of *Cains and wife vs. Marley*, 2 Yer. Rep. 582. That the words "throw into the hands of my sons-in-law," with the words which follow them, however unusual and artificial, want the force and efficacy of the words give or transfer, &c., it would be difficult to maintain. They create a present interest in the remainder. The instrument in question is more than a mere deed of gift. It is based upon a valuable consideration, the debt to the step-children and the liability of the sons-in-law; its object is to pay the former, and to indemnify the latter; and as to the surplus, it is a donation in trust for all the children of the grantor.

NASHVILLE,
December, 1839.

Drane
v
Bayliss.

To hold it testamentary and revocable would defeat the whole intention of the arrangement and the entire scope of the instrument. It would be to permit Mary Currie to wrest from the hands of her sons-in-law and sureties the property thus thrown by her into them, so as to leave the step-children without the payment of their debt, her sons-in-law and sureties without their indemnity, and the children without the surplus of the remainder. This view, as to the construction and legal effect of the instrument, is decisive of the whole case, and renders it unnecessary to discuss any other questions which are presented by the record. The bill will be dismissed as well as the cross bill, and the complainants will severally pay their own costs. The costs of the defendants in the original bill will be paid by the administrator out of the funds in his hands.

DRANE *vs.* BAYLISS, *et ux.*

Isaac Shelby died, having made his will and appointed John Shelby his executor; John Shelby died, and appointed A. M. Shelby his executor: Held, that A. M. Shelby was the executor of the first testator; yet a failure to give bond and qualify as executor of first estate, in pursuance of the provisions of the act of 1813, ch. 119, sec. 3, was a renunciation of the executorship.

Where a testator appointed A his executor and the testamentary guardian of his children, with power to sell property for payment of debts, to give property to the legatees as they should marry or come to full age, and to keep the balance of the property together and cultivate the farm for the support of the widow and children till the youngest come of age: Held, that after the payment of the debts of testator, the payment of some legacies and the placing the property on the farm, A held the property as testamentary guardian and not as executor.

Isaac Shelby died in 1813, having made his last will in August, 1812, in the following words, to wit: "It is my will that my executor keep all of my property of every description together on my plantation for the support of my wife and children, except such as he may deem sufficient to pay my just debts and funeral expenses; and it is my will that my executor divide my property as near equally as can be done, between my wife and my ten children, Henry, John, Priscilla,

Evan, Letitia, Jenkin W., Polly, Sally, Tennessee and Alfred, at the time my youngest children come of age; although I wish him to divide to my respective children, as they may marry or come of full age, at his discretion, reserving a sufficiency for the support and education of my youngest ones and wife, as he shall think most advisable from time to time, as such events of that kind may happen. It is further my will, that my executor, at the time my youngest child comes of age, divide my lands or sell them, so that they can be equally divided amongst them all. It is my will that my brother, John Shelby, be guardian for all my children until they come of full age, and he is hereby appointed sole executor of this my last will," &c.

NASHVILLE,
December, 1839.

Drane
v
Baylis.

This will was duly proven in the county court of Montgomery, in which county the decedent resided at the time of his death, and John Shelby gave bond for the faithful performance of his duties as executor, and qualified according to law: John Shelby took the property into his possession, paid the debts, as far as appears on this record, and properly managed the estate in all things; he placed the slaves on the farm on which the deceased resided and cultivated it; he delivered to Henry Shelby, one of the oldest children, two slaves, as a portion of the property coming to him from his deceased father's estate. In this condition of things, in the year 1818, John Shelby, the executor, died, having previously made his last will and testament, appointing Alfred M. Shelby and others, his executors. A. M. Shelby gave bond and qualified as executor according to law. The others did not give bond, or in any manner take upon themselves the office of executor. The will of John Shelby made no mention of the estate of Isaac Shelby, deceased, or the executorship of that estate. It does not appear that Alfred M. Shelby ever took upon himself the execution of any of the trusts of the will of Isaac Shelby, deceased, or in any manner assumed the management or control of the property of said Isaac.

In the month of February, 1821, the widow of Isaac Shelby, deceased, and John Shelby, the son of said Isaac, sold the negro boy, Carter, the subject of this suit, for a full and

NASHVILLE,
December, 1839.

Drane
v
Bayliss.

fair consideration, to Hugh M'Clure, and the boy come by purchase to the hands of W. H. Drane about the year 1830.

Mary Shelby, one of the daughters of Isaac Shelby, was about eight years of age at the time of her father's death, and intermarried with Joel Bayliss in the year 1823. In the year 1836, Joel Bayliss and his wife applied to the county court of Montgomery county for letters of administration, *de bonis non*, upon the estate of Isaac Shelby, deceased, with the will annexed, which were granted by an order to the following effect:

"It appearing to the satisfaction of the court that Isaac Shelby, deceased, died with a will, and had appointed John Shelby his executor, who died without administering or settling said estate, and that twenty years have not passed since the death of said Isaac Shelby; and it also appearing that Mary Bayliss is a child and distributee of said Isaac Shelby, and was an infant at the time of her father's death; on motion, it is therefore ordered by the court, that Joel Bayliss and his wife, Mary Bayliss, be appointed administrator and administratrix of her deceased father's estate, with the will annexed, and that they enter into bond and security satisfactory to the court, and qualify according to law."

Joel Bayliss and wife, Mary, as administrator and administratrix, instituted an action of detinue in the circuit court of Montgomery county on the 10th day of April, 1837, against Walter H. Drane, for the purpose of recovering the slave Carter, sold to M'Clure in February, 1821.

The defendant pleaded; 1. *Non detinet*. Upon this plea issue was taken.

2. That the supposed cause of action did not accrue at any time within three years next before the bringing of this suit. To this plea there was a general replication and issue.

3. That said Isaac Shelby, upon whose estate the said plaintiffs claim to be administrator and administratrix, departed this life in 1813, and that said plaintiff did not administer upon the estate of said Isaac till the year 1835, more than twenty-one years after the death of said Isaac, and more than three years after the passage of the act of 1831 limiting the

time for the grant of letters of administration on decedent's estate.

NASHVILLE,
December, 1839.

Drane
v
Bayliss.

4. That the plaintiffs are not the administrator and administratrix of the said Isaac, deceased, with the will annexed; issue was joined on this plea.

5. That plaintiffs' supposed cause of action did not accrue at any time within three years next after the termination of the twenty years given by the legislature in 1831, ch. 24, limiting the time within which administration may be granted upon the estate of deceased persons.

6. That said plaintiffs' supposed cause of action did not accrue at any time within three years next after the termination of the twenty years allowed by the legislature in 1831, ch. 24, limiting the time within which administration may be granted on the estate of deceased persons, and the passage of the act of assembly of this State in 1835, ch. 86, making it lawful for administration to be granted at any time within thirty years from the death of the testator or intestate to any person entitled to a distribution of the estate of said testator or intestate, who were infants or *femes covert* at the time of the death of the testator or intestate.

To the third, fifth and sixth pleas of the defendant the plaintiffs filed a special replication, in which they averred "that plaintiffs were intermarried before the passage of the act of 1831, ch. 24, sec. 3; that they are yet man and wife, and that said Mary, alias Polly Bayliss, is the daughter of said Isaac Shelby, deceased, and one of his next of kin and legatees and distributees, and that she was an infant at the death of her said father, and that her father, Isaac, made and published his last will and testament, in which he appointed John Shelby his executor, who qualified and acted as such, till his death in 1818."

The defendant demurred to this replication, and the plaintiffs joined in demurrer.

The cause was continued till the May term, 1838, at which time the honorable James Rucks, the presiding judge, overruled the demurrer to the plaintiffs' replication, and rendered judgment upon the issues of law in favor of the plaintiffs. The issues of fact were then submitted to a jury of Mont-

NASHVILLE,
December, 1839.

Drane
v
Bayliss.

gomery county upon the above stated facts. The court charged the jury that if they found that the negro, Carter, belonged to Isaac Shelby, deceased, at the time of his death, and was not sold or disposed of by his executor, but was left on the farm of said Isaac at the death of his executor, John Shelby, said slave belonged to the estate of said Isaac, and that his widow and son had no right to sell him to said Hugh M'Clure, that said sale was void, and that Drane would derive no title to the said negro by the purchase of Hugh M'Clure, but that the title to said slave was vested in the plaintiffs as administrator and administratrix of John Shelby, deceased, upon the grant of letters of administration, with the will annexed, of Isaac Shelby, deceased, to them by the county court of Montgomery county, in June, 1836. The court also charged the jury that the statute of limitations did not commence running in favor of the defendant, or those under whom he claimed, until the appointment of the plaintiffs as administrator and administratrix, as aforesaid, in June, 1836; that the appointment of Alfred M. Shelby, in the last will and testament of John Shelby, deceased, as executor, his suing out letters testamentary upon the estate of John Shelby, deceased, his giving bond and taking oath according to law to execute the will of the said John Shelby, deceased, did not constitute him executor of the last will and testament of Isaac Shelby, deceased, nor authorize him to sue for the recovery of said slave, Carter. The court further charged the jury that the grant of letters of administration to the plaintiffs, with the will annexed, of Isaac Shelby, deceased, was legal and valid, and authorized them to sue as such. The court further charged the jury that the plaintiffs' action was not barred by the statute of 1831, ch. 24, sec. 3.

Upon this charge the jury returned a verdict on the issues of fact in favor of the plaintiffs for the value of the slave, six hundred dollars, and the hire of him whilst in Drane's possession, from 1836 till the commencement of suit, two hundred dollars. A motion was made to set aside this verdict, but was overruled, and judgment rendered in conformity with the verdict, from which the defendant appealed in error to this court.

NASHVILLE,
December, 1839.Drane
v
Bayliss.

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NASHVILLE,
December, 1839.

Drane
v
Daylies.

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NASHVILLE,
December, 1839.Drane
v
Baylis.

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NASHVILLE,
December, 1839.

Drane
v
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NASHVILLE,
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NASHVILLE,
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Drane
v
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NASHVILLE,
December, 1839.

Drane
v
Baylis.

NASHVILLE,
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Drane
v
Bayliss.

To hold it testamentary and revocable would defeat the whole intention of the arrangement and the entire scope of the instrument. It would be to permit Mary Currie to wrest from the hands of her sons-in-law and sureties the property thus thrown by her into them, so as to leave the step-children without the payment of their debt, her sons-in-law and sureties without their indemnity, and the children without the surplus of the remainder. This view, as to the construction and legal effect of the instrument, is decisive of the whole case, and renders it unnecessary to discuss any other questions which are presented by the record. The bill will be dismissed as well as the cross bill, and the complainants will severally pay their own costs. The costs of the defendants in the original bill will be paid by the administrator out of the funds in his hands.

DRANE vs. BAYLISS, *et ux.*

Isaac Shelby died, having made his will and appointed John Shelby his executor; John Shelby died, and appointed A. M. Shelby his executor: Held, that A. M. Shelby was the executor of the first testator; yet a failure to give bond and qualify as executor of first estate, in pursuance of the provisions of the act of 1813, ch. 119, sec. 3, was a renunciation of the executorship.

Where a testator appointed A his executor and the testamentary guardian of his children, with power to sell property for payment of debts, to give property to the legatees as they should marry or come to full age, and to keep the balance of the property together and cultivate the farm for the support of the widow and children till the youngest come of age: Held, that after the payment of the debts of testator, the payment of some legacies and the placing the property on the farm, A held the property as testamentary guardian and not as executor.

Isaac Shelby died in 1813, having made his last will in August, 1812, in the following words, to wit: "It is my will that my executor keep all of my property of every description together on my plantation for the support of my wife and children, except such as he may deem sufficient to pay my just debts and funeral expenses; and it is my will that my executor divide my property as near equally as can be done, between my wife and my ten children, Henry, John, Priscilla,

Evan, Letitia, Jenkin W., Polly, Sally, Tennessee and Alfred, at the time my youngest children come of age; although I wish him to divide to my respective children, as they may marry or come of full age, at his discretion, reserving a sufficiency for the support and education of my youngest ones and wife, as he shall think most advisable from time to time, as such events of that kind may happen. It is further my will, that my executor, at the time my youngest child comes of age, divide my lands or sell them, so that they can be equally divided amongst them all. It is my will that my brother, John Shelby, be guardian for all my children until they come of full age, and he is hereby appointed sole executor of this my last will," &c.

NASHVILLE,
December, 1839.

Drane
v
Baylis.

This will was duly proven in the county court of Montgomery, in which county the decedent resided at the time of his death, and John Shelby gave bond for the faithful performance of his duties as executor, and qualified according to law: John Shelby took the property into his possession, paid the debts, as far as appears on this record, and properly managed the estate in all things; he placed the slaves on the farm on which the deceased resided and cultivated it; he delivered to Henry Shelby, one of the oldest children, two slaves, as a portion of the property coming to him from his deceased father's estate. In this condition of things, in the year 1818, John Shelby, the executor, died, having previously made his last will and testament, appointing Alfred M. Shelby and others, his executors. A. M. Shelby gave bond and qualified as executor according to law. The others did not give bond, or in any manner take upon themselves the office of executor. The will of John Shelby made no mention of the estate of Isaac Shelby, deceased, or the executorship of that estate. It does not appear that Alfred M. Shelby ever took upon himself the execution of any of the trusts of the will of Isaac Shelby, deceased, or in any manner assumed the management or control of the property of said Isaac.

In the month of February, 1821, the widow of Isaac Shelby, deceased, and John Shelby, the son of said Isaac, sold the negro boy, Carter, the subject of this suit, for a full and

NASHVILLE,
December, 1839.

Drane
v
Bayles.

ferred on him by the same name but which belong to him as testamentary guardian and trustee. Much of that difficulty would be obviated by considering these duties as conferred on different persons. Suppose in this case that John Shelby had been appointed executor and had been directed by the will to collect debts and to sell so much of the effects as would be sufficient to pay debts and funeral expenses, and then that he should place all the property upon the plantation; and after that, that A B, appointed testamentary guardian and trustee *eo nomine*, had been directed to perform all the matters and things directed in the will. If, after the property had come into the hands of A B, the executor had died, and the plaintiffs had entered upon their present office, A B living, could the plaintiffs have meddled with him or the property? If then A B had died, would the circumstance have enlarged the powers of the plaintiffs? Certainly not: and yet in legal effect that is the case before the court. In the case supposed, after the death of A B a court of chancery and not a court of probate should have appointed a proper person to carry into effect the trusts of the will; and such should have been the course in the present case. See Roper on Legacies, 559: 5 Yerger's Rep. 220: 3 Devereaux Rep. 417: 2 Plowden, 545: 2 Williams on Executors, 853, 848: 6 M. Ch. R. 151. The point in the statute limiting the grant of administration we think was properly decided in favor of the plaintiffs. But upon the grounds above stated we feel it to be our duty to set aside the verdict and to reverse the judgment rendered thereon; and we remand the cause to the circuit court for further proceedings.

*Twiss et al. vs. MARTIN's Administrators and Distributees.*NASHVILLE,
December, 1839.Twiss
v
Martin.

Where slaves were loaned by the father-in-law to the son-in-law by parol, and the son-in-law held the possession of them for more than five years, but that possession was not continuous but was broken by repeated restorations of the slaves to the father-in-law during that period: Held, that the property in the slaves did not vest in the son-in-law so as to subject them to the claims of the *bona fide* creditors of the son-in-law contracted during the said period of five years.

Where property has continued for five unbroken years in the possession of the son-in-law, and the possession is then restored to the father-in-law, and during the continuance of the possession of the father-in-law debts are contracted and the property is, whilst in the possession of the father-in-law, conveyed by him to a trustee for the benefit of the wife and children of the son-in-law, this deed is good against such creditors, and is fraudulent only as against the creditors whose debts are contracted during the five years possession of the son-in-law.

On the 26th day of March, 1838, Hiram Twiss, a citizen of Davidson county, and Mark Leavenworth, a citizen of Connecticut, filed this bill in the chancery court at Gallatin, as creditors of the estate of Samuel Martin, deceased, on behalf of themselves and the other creditors who should come in under the decree that might be made and contribute to the costs and expenses thereof.

The bill charges that in 1818, Samuel Martin, a citizen of Sumner, married Sally, a daughter of Abraham Young, and that in a short time after the marriage Young advanced to his daughter and son-in-law two negro girls, slaves, to wit, Betsy and Jinny, and delivered the possession thereof to said Martin, and that they and their increase during the lifetime of said Samuel remained in the possession of said Samuel, and were still in the possession of his widow, the said Sally Martin, and that said Samuel Martin was the absolute owner thereof; that one of the slaves had three children, of which Martin also held possession during his life, and was the absolute owner. They further charge that they are informed that a deed of trust had been executed by Abraham Young and Samuel Martin, bearing date the 13th August, 1832, by which they conveyed said slaves for a nominal consideration to M. A. Martin, senior, in trust for the support and maintenance of the said Sally, wife of Samuel, de-

NASHVILLE,
December, 1839.

Twiss
v
Martin.

ceased, and the children which they then had and might afterwards have, and at the death of said Sally they should be equally divided amongst the children of said Sally. The bill charges that Martin, at the date of the deed of trust and for a long time before and from thence till his death, was much embarrassed in his circumstances, and that if the said negroes were excluded from his estate he was insolvent when the deed was made, and from that time till his death. The bill further charges that the deed was not legally proven and registered, and that complainants were wholly unapprised of its existence till the death of said Martin, and that they trusted him in the creation of debts upon the faith of said slaves, which he held whilst he lived and of which he died possessed, and that said deed was fraudulent and void, and they pray that it may be cancelled and declared void. The bill further charges that Martin was indebted to complainant Twiss about the sum of two thousand seven hundred and seventeen dollars, due by notes, and complainant Leavenworth in the sum of one thousand five hundred dollars, due also by note; that he died a resident of the county of Sumner in the month of August, 1836, leaving Sally, his widow, and John F. Martin, M. A. Martin, junior, and Lucinda Y. Martin, his heirs and distributees; that letters of administration were granted upon his estate by the county court of Sumner at the October term, 1836, to Peter W. Martin and Sally Martin, his widow, as aforesaid; that said administrator and administratrix had reported the estate insolvent, and that the estate of said Martin exceeded in value the sum of five hundred dollars. The bill further charges that said Samuel died possessed of real estate, and that the administrator and administratrix refused to take the necessary steps to appropriate the real estate or slaves to the payment of the debts of the intestate; that Abraham Young was dead, and that H. Frey had administered upon his estate.

The bill prays that M. A. Martin, H. Frey, the administrator of Young, and Peter and Sally Martin, administrator and administratrix of S. Martin, deceased, and John F. Martin, M. A. Martin, junior, J. Walsh and wife, L. Y., the heirs and distributees of said Samuel, be made defendants; that

an account be taken of the real and personal estate of decedent, Martin, the negroes included; and that the same be sold and the proceeds applied to the payment of the debts set forth in the bill as due complainants and the debts of such other creditors as might come in under the decree; that all proceedings in the county court of Sumner be enjoined; and that the assets of the intestate and the further administration of said estate be transferred to the chancery court. In conformity with the prayer of the bill, process of the court was served on all of the defendants.

NASHVILLE,
December, 1839.

Twiss
v
Martin.

H. Frey did not answer the bill, and it was taken for confessed as to him, and set down by complainants for hearing *ex parte* as to him.

John F. Martin, M. A. Martin, junior, Lucinda Y. Walsh and Thomas Walsh stated that the slaves mentioned in the bill were in the possession of their father and mother at the time of their father's death, and had been for some time before, except that said slaves were twice or oftener taken to Abraham Young's and their place supplied by others, and were subsequently returned; that they know nothing in regard to the motives which operated upon Samuel Martin, A. Young and M. A. Martin in the execution of the deed of trust, &c. &c.

The administrator and administratrix of S. Martin answered. They denied explicitly that Abraham Young had ever given the two slaves, Betsy and Jinny, or their increase, to the said Samuel and his wife, but that the slaves were sent to them shortly after their marriage, in 1819, with the express and positive understanding that they were loaned and not given, and that this was made known at the time of the delivery of the said slaves, was repeatedly spoken of, recognised by all the parties interested, and acted upon for a series of years by them; that Young repeatedly sent for the slaves and took them home with a view to make manifest his ownership of them; and that he had the possession of them at the time the deed of trust set forth in the bill of complainants was executed, and that he was the absolute owner of them at that time. They deny that Samuel Martin was at the date of the deed insolvent, excluding the

NASHVILLE,
December, 1839.

Twiss
v
Martin.

slaves; and state that at the time of its execution, Abraham Young gave him absolutely one of the slaves with a view to have her sold for the payment of the debts of said Samuel Martin.

The defendants stated that they had reported the estate of Samuel Martin insolvent; that such was the fact; that advertisement had been made and other steps taken in accordance with the acts of the legislature, and that a settlement had been made by commissioners duly appointed for that purpose; that complainants had not filed their claims according to law and that they were excluded, &c. &c.

M. A. Martin answered and stated that he knew nothing of his own knowledge with regard to the title of the slaves mentioned in the bill; but that Samuel Martin and Abraham Young had applied to him for the purpose of procuring him to act as trustee for the benefit of the wife and children of Samuel Martin; that before he agreed to act, he enquired of said Samuel Martin and Abraham Young if their object and intention was to delay or defraud any of the creditors of said Samuel, informing them at the same time, if such was their object that he would not have any thing to do with the transaction; that said Young informed him that all the existing debts of said Samuel should be paid; that a negro should be left out of the deed of trust for that purpose; that the slaves in question were his own; that Samuel Martin was a bad manager and somewhat intemperate in his habits, and that his sole object was to make a provision for his daughter and children; having good reasons to believe those statements to be true he consented to act as trustee, informing them that the deed should not form any obstacle in the way of the then existing creditors of said Samuel. The deed was accordingly executed, and was acknowledged in the county court of Robertson, and delivered over to Abraham Young, who promised to have it registered; respondent did not have anything further to do with the property or the deed until the death of said Young, as the said Young, by the terms of the deed, had the right of controlling during his lifetime the mode in which said property should be enjoyed by the beneficiaries of the deed; he then found that

the deed had been mislaid, but was again found and registered after the death of said Samuel; respondent believing that there was no fraud intended in the execution of said deed of trust, notified the administrator and administratrix of Samuel Martin's estate not to intermeddle with the slaves mentioned in the same; respondent asserts that complainants have not placed themselves in such an attitude before the court as to authorize them to question the validity of the deed, &c. &c.

NASHVILLE,
December, 1839.

Twiss
v
Martin.

The complainants filed a general replication to the answers of the defendants; much proof was taken, the substance of which, so far as it bears upon the points involved in the cause, is as follows:

Samuel Martin was married to Sally Young, daughter of Abraham Young, in the year 1819, in the county of Robertson. He settled in the county of Sumner, and in the same year, to wit, 1819, A. Young sent him two negro girls, (slaves.) They were loaned and not given, and this was the explicit understanding of all parties at the time they were sent, though there was no writing in regard to the title or possession of the slaves at the time. Martin became intemperate and was a bad manager and became embarrassed in his circumstances. In 1822 he became insolvent, and all his property real and property was sold by execution; the slaves were not however interfered with by the officers under the belief that they belonged to Young. They were in the possession of Samuel Martin. This possession was continued except at times, when Young would send for them, and resume the control of them with a view to manifest his ownership, and then return them. This was done repeatedly; the uninterrupted possession of them never continued in Martin more than two years at any one time. The negroes increased in number and value and Martin's circumstances improved, and most of his debts which created the insolvency of 1822 were discharged; he was still, however, intemperate at times. In the month of August, 1832, Young again took possession of the slaves and took them to his house with the consent of Martin, who acknowledged his ownership. The deed was then executed and signed by Samuel Martin and Abraham Young.

NASHVILLE,
December, 1839.

Twiss
v
Martin.

This deed, after reciting that Samuel Martin had married Sally Young, the daughter of Abraham Young, in 1819, and that said Young had sent to the house of said Samuel Martin two slaves shortly after marriage, where they had been permitted to remain until within ten or twelve days of the execution of the deed; and after further reciting that said slaves had increased, and that said Abraham Young and said Samuel Martin were desirous of securing to said Sally and the children which she then had and which she might afterwards have "a maintenance and support independent of the control of said Samuel," declared that said Samuel Martin and Abraham Young did bargain, sell and deliver to M. A. Martin the said negroes, (slaves,) and their increase, to hold in trust for the use and benefit of the said Sally, the children which she then had and which she and the said Samuel might afterwards have, in such manner as the said Abraham Young might direct, by hiring them out or by permitting them to remain in the possession of the said Sally and her children; and that at the death of the said Sally they should be equally divided between the children; and that in the event that any of the said children should die, the said slaves and their increase should go to the survivors or survivor of them share and share alike, to be possessed and enjoyed by said children free from and discharged of all the trusts created by the deed. The deed further provided that "it was covenanted and agreed that in case of the death of said Abraham Young, such part or portion of the estate of said Abraham Young as might belong to said Samuel in right of his wife, the said Sally, upon a settlement of such estate as the said Young should die seized and possessed of, should be settled on the said Sally and her children aforesaid according to the declaration of trusts and uses of the deed, so as to be likewise free from the control of said Samuel." The deed was acknowledged in the county court of Robertson county at the August term, 1832, and deposited in the hands of Young, who it seems mislaid it. In the years 1833, 1834 and 1835, Martin engaged in the purchase and sale of clocks, and in the months of April, May, July and August of 1835 he contracted the debts set forth in the bill of complainants. It was with some diffi-

culty that he was able to raise the means of purchasing clocks, and his condition was regarded as doubtful, and the agents of complainants refused to let him have clocks without the deposit of promissory notes of individuals as collateral security for the debts contracted in the proportion of one dollar and fifty cents for each dollar of debt. This was done to a considerable extent, but by reason of the insolvency of the payors of the notes the complainants had failed to make their money. About this time Martin told the trustee that Young had, as he supposed, destroyed the deed, and stated to the agent of the wholesale dealer in clocks, after the creation of the debts of complainants, that he had a valuable family of negroes. In the latter part of 1835 Young died, and the deed of trust was not found. H. Frey administered upon his estate. In the distribution of his estate Martin claimed a full share, alleging that he had received nothing therefrom. In August, 1836, S. Martin died, and Peter Martin and his wife, T. S. Martin, administered upon his estate, reported it insolvent, and had a *pro rata* division of his effects among his creditors. After his death the deed was found and registered on the 22d November, 1836. The trustee took the control of the slaves. The complainants refused to come in for their proportion of the estate and filed this bill, which, upon the above facts and state of pleadings, came on for trial at the October term, 1839, before the honorable L. M. Bramlett, chancellor, who being of the opinion from the proof that the slaves were not in 1819 given to Martin, and but loaned to him only, and that they had not remained in the possession of Martin five years at any one time previous to the execution of the deed in 1832, that Young had the possession and was the legal owner of said slaves and their increase at the time of the execution of the deed, that the same was a valid and legal conveyance of the property therein, ordered the bill of complainants to be dismissed as to M. A. Martin, Sally Martin, Lucinda Y. Walsh and her husband, John Walsh, and M. A. Martin, junior, and that the complainants pay the costs of making them parties; and that the clerk and master take an account of the assets of the estate of Samuel Martin, de-

NASHVILLE,
December, 1839.

Twiss
v
Martin.

NASHVILLE,
December, 1839.

Twiss
v
Martin.

ceased, in the hands of his administrator and administratrix, and also that he should ascertain the amount of the debts due the complainants, and that the said complainants should come in *pro rata* with the other creditors of Samuel Martin, deceased, in the distribution of assets in the hands of the administrator and administratrix which had not been paid out under the proceedings in the county court, &c.

From this decree the complainants appealed.

J. W. Campbell, for the complainants. 1. The recital in the deed clearly vests the title to the negroes in Samuel Martin at the date of the same, and being embarrassed in his circumstances he could not make the conveyance so as to shield the property from the claims of his creditors. Although complainants are subsequent creditors the deed is as much void as to them as to previous creditors.

2. The deed was never registered till after the death of Samuel Martin, in 1836, and it is void as against the creditors of S. Martin because of its non-registration. See act of 1831, ch. 90, sec. 2, 5 and 6. Property secured to the separate use of the wife is by this act required to be registered.

3. The chancellor should have decreed to complainants a proportionable part of their debts out of the assets which had been paid over, as well as of those that might thereafter accrue; because: 1st. The administrator and administratrix did not state of their own knowledge that notice had been given in accordance with the provisions of the act of 1833, ch. 36, sec. 1, N. and C. 395. 2d. There is no record produced showing any order directing an advertisement for all creditors to come in, as required by the act of 1833, ch. 36, sec. 1, N. and C. 395. It is insisted that complainants have no judgment at law, and that they refused to come in at a proper time for their proportionable share, and are therefore precluded. The provisions of the act of 1837, ch. 111, prohibited them from suing at law, and authorized them to file this bill; but independent of the act, upon general grounds of chancery jurisdiction, the complainants had a right to proceed in this way for the establishment of their demands against trustees, for the discovery of assets, and the removal

of impediments that stood in the way of making available, in the payment of their debts, all the assets belonging to the estate. See 1 Story's Equity, ch. 9, in which all the authorities upon this branch of law are collected, reviewed, and the correct principles declared.

NASHVILLE,
December, 1833.

Twin
v
Martha.

Cook, for the defendants, cited 7 Johnson's Reports, 161: Cro. Jas. 270: *Cobb vs. Lanier*, 4 Haywood's Rep.: Roberts on Frauds, 641-2-3-4-5: 16 Johnson, 189: 7 Mass. 354.

REESE, J. delivered the opinion of the court.

This bill is filed against the administrators for an account, and against the distributees to subject certain negroes to the satisfaction of the claim of complainants, on the ground that the negroes were in fact, or at all events by operation of the third section of the act of 1801, ch. 25, as to creditors, the property of the intestate, and were fraudulently conveyed by him and a certain Young to the defendants in his lifetime. As to this latter branch of the case much testimony has been taken, and one proposition is clearly established in proof, namely, that the possession which the intestate had of the negroes in controversy was as bailee and not as donee; the negroes were lent to him by Young, his father-in-law, and not given. But it is said that they continued for more than five years in the possession of the intestate, and so, by the provisions of the act referred to, were liable to the claims of his creditors. But a great many witnesses state, in general terms, that the negroes were re-possessed by Young once at least in every two years, and two or three instances of re-delivery and re-possession are specially proved. As a matter of fact, then, we think it well established that the negroes never continued for the term of five years at any one time in the possession of the borrower. But if this were not so, it is proved that in 1832, when the conveyance to the trustee of the defendants was made by the intestate and Young, the negroes were in the actual possession of Young and had been for some weeks; and if, prior to that time, they had remained for more than five years in the possession of the intestate, they would still have continued the property of the

NASHVILLE,
December, 1839.

Twiss
v
Martin.

bailor except as to the claim of creditors existing at and during that period. But the complainants became creditors subsequently to the regaining of possession by Young in 1832, and have no claim to affect the property founded on the prior possession of the bailee. This point was decided by this court in the case of *Walker vs. Wynne*, 3 Yerger's Rep. 72. The court in that case say, "We are of opinion, from the evidence, the property was a loan to the son; and although in the first instance the negro remained with him for the space of five years, and thereby became liable to creditors who were such at the expiration of the term of five years, yet before these defendants became such, the property was re-vested in the complainant, who held the same as his own. As against his son he could retain the property; neither time nor limitation operated for him, being a mere bailee. When the father became possessed of the property a second time, and then parted with it, it was a new lending, and five years not having elapsed since such last loan, these creditors could not seize and sell this property." There is nothing opposed to this view of the case in *Peters vs. Chares*, 4 Yerger, 176. What is said in that very brief case is confirmatory of it. We are altogether satisfied of its correctness, and we affirm the chancellor's decree dismissing the bill as to the claims for the slaves from the distributees.

NASHVILLE,
December, 1839

HORSELY vs. BRANCH.

Horsely
v
Branch.

Horsely hired his slave to Branch with a special agreement that he should not be employed "in or about the water." The employment of the slave "in or about the water" was a conversion of him, and being subsequently destroyed by inevitable accident, Branch would be liable in trover though no injury occurred at the time of the conversion.

When there are several counts in a declaration and a jury find for the defendant on all but one, and for the plaintiff on that: Held, that though evidence show a good cause of action, yet if it be inapplicable to the count on which the jury have placed their verdict, such verdict cannot be sustained.

Counts in case and in trover may well be joined.

Where a count sets forth a special contract of hiring, to wit, that a slave hired should not be employed "in or about the water," the plaintiff must show not only an employment of the slave in or about the water, but that in such employment the injury or destruction of the slave took place. No previous conversion or subsequent destruction of the slave will sustain a finding on such a count.

Where a slave is hired for twelve months and converted by the hirer before the twelve months expire, the owner has a right of action in trover instantly upon the conversion and need not wait till the expiration of the twelve months; *secus*, where the conversion is by a third person.

William M. Branch instituted an action of trespass on the case in the circuit of Maury county against William Horsely on the 16th day of April, 1838. At the May term of that year he filed his declaration, in which he averred that "in consideration that the plaintiff, at the special instance and request of the defendant, had hired and caused to be delivered to the said defendant a certain negro man, a slave for life, named Isaac, the property of said plaintiff, of the value of, &c. to be used and controlled as a hired servant, and safely and securely kept by the said defendant for the full and complete term of twelve months for the sum of one hundred and twenty dollars, and then to be delivered to the said plaintiff; and the said defendant, at the time of the hiring aforesaid, then and there undertook, agreed and promised to and with the said plaintiff that the said negro slave should not be put and caused to work and be employed in or about the water so as to endanger his health and life, and to take due and proper care of the said negro slave for the said term of twelve

NASHVILLE,
December, 1839.

Horsely
v
Branch.

months, and at the expiration of the said term of twelve months to re-deliver the said negro to the said plaintiff and when he should be thereunto afterwards requested; and although the said defendant afterwards, to wit, on the — day of —, 1836, in the county and State aforesaid, was requested by the said plaintiff to re-deliver the said negro slave, the property of the said plaintiff, so hired and delivered to him, the said defendant, by him, the said plaintiff, as aforesaid, at, &c. &c., yet said defendant did not keep the said negro slave so hired and delivered as aforesaid from in or about the water, by reason whereof the said negro slave was drowned and wholly lost to the owner, nor did the said defendant take due and proper care of the said slave, so hired and delivered as aforesaid, nor did the said defendant, though requested so to do, at any time before or since, re-deliver the said negro man slave to the said plaintiff."

And plaintiff further averred "that the said defendant, at his special instance and request, had hired and had the possession and care of a certain other negro man named Isaac, the property of said plaintiff, of the value of, &c.; yet the said defendant did not take due and proper care of the said negro man slave so hired and delivered as aforesaid, but wholly neglected and refused so to do, and took such bad care thereof that afterwards, to wit, on the — day —, 1836, the said last mentioned slave became and was totally lost to the said plaintiff."

The third count was a common count in trover; the defendant pleaded not guilty.

At the September term, 1838, there was a mis-trial, and at the August term, 1839, it was tried, his honor Judge Dillahunty presiding, and a verdict rendered by the jury for one thousand dollars damages on the first count, and a verdict for the defendant on the second and third. A motion was made by the defendant for a new trial. This was overruled and a motion made to arrest the judgment of the court, which was also overruled, and a judgment rendered in conformity with the verdict of the jury. From this judgment an appeal was taken in the nature of a writ of error to the supreme court:

The facts of the case are fully and explicitly stated in the opinion of the court.

NASHVILLE,
December, 1859.

Horsely
v
Branch.

Frierson, for plaintiff in error. 1. The verdict is contrary to the evidence; the evidence does not show that the plaintiff in error was guilty of such negligence at the time the negro was lost as would render him responsible in case: it is incumbent on the plaintiff or owner of the property to show that the loss was the result of the negligence or carelessness of the hirer. 2 Kent's Com. 585: 7 Cow. 500, note: 3 Taun. 204: 5 Barn. and Cress. 222.

2. Case does not lie and is not the proper action when the property hired has been used for a purpose different from that for which it was hired. Trover is the proper action. 5 Mass. 104, *Wheelock vs. Wheelright*. The evidence does not sustain the finding on the first count.

3. The declaration has not sufficient certainty in describing the contract, and the judgment should have been arrested.

Pillow and Dew, for the defendant in error. 1. The evidence fully sustains the finding of the jury; but where there has been no misdirection of the court to the jury, no fraud or improper conduct on the part of the individual in whose favor the verdict is rendered, and a full and impartial investigation has taken place, there must be a very decided preponderance of evidence against the finding to authorize the court to set it aside. *Angus vs. Dickerson*, Meigs, 409: *Dodge vs. Brittain*, Meigs, 84, 85, 86: *Farborough vs. Abernathy*, Meigs, 413, 418: *Wilson vs. Nations*, 5 Yer. 211: 4 Yer. 323, 503: *Kelton vs. Bevins*, Cooke, 90, 102: Story on Bailments, 263, 273.

2. There is an obligation resting upon all hirers of things to use them with due care and moderation, and not to apply them to any other use than that for which they were hired; and if a thing is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but if a loss occurs, although by inevitable casualty, he will be held responsible therefor. Story on Bailments, 272:

NASHVILLE, Jones on Bailments, 68, 69, 121: *Wheelock vs. Wheelright*,
December, 1839. 5 Mass. 104: 2 Ld. Ray. 909, 917: 2 Saunders, 47: 1 Yer. 73.

Horsely
v
Branch.

3. The first count in the declaration would be good though no consideration was alleged. The rule is that where the action is for a breach of an express or implied contract and brought for nonfeasance, the consideration must be stated, but when it is for misfeasance or malfeasance no consideration need be stated. 1 Ch. Pl. 417: 5 Term R. 193: 3 East, 62: 6 East, 332: 1 Saunders, 312: 4 T. R. 718. There is, however, a consideration stated, and the terms of the special hiring are set out with sufficient accuracy. If the law required a consideration to be stated, and the consideration was not stated, yet would this defect be cured by the verdict of the jury. The rule is, that where there is any defect, omission or imperfection, whether in form or in substance, which would have been fatal on demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or improperly stated or omitted, and without which it is not to be presumed that the judge would have directed the jury to give, or they would have given the verdict, such defect, imperfection or omission is cured by the verdict. 1 Ch. Pl. 329.

GREEN, J. delivered the opinion of the court.

This is an action to recover the value of a negro man, slave, that was hired by the defendant in error to the plaintiff in error, and was drowned while in the service of said plaintiff in error. There are three counts in the declaration; the first count alleges that Branch hired his negro man, Isaac, to Horsely for the term of twelve months, and that the defendant undertook and agreed that said negro slave should "not be put and caused to work and be employed in or about the water, so as to endanger his health and life:" breach, that said slave was not kept from in and about the water, by reason whereof he was drowned and wholly lost to the plaintiff. The second count alleges that the defendant hired the negro man slave, Isaac, the property of the plaintiff, for twelve months, and that the defendant, contrary to his duty, took such bad care of the negro, Isaac, that he became lost to

the plaintiff. The third is a common count in trover for the negro man, Isaac.

NASHVILLE,
December, 1839.

Bornely
v
Branch.

The plaintiff proved by T. M. Branch and James G. Branch, that the contract of hiring was, that Isaac "was not to work in or about the water, but that defendant agreed to employ him in cutting and hauling saw-logs and on his farm." He also proved by Charles Burke, who was in the employment of the defendant the year Isaac was there, that some time before Isaac was drowned, he went up the river for a raft of saw-logs and came down in a canoe before the logs, the water being deep in many places. Isaac was also engaged in taking gravel to the mill-dam in a canoe and was once turned over when so engaged, and was drawn out of the river by witness. Many other witnesses proved that Isaac was employed in taking gravel to the dam in a canoe. Several witnesses proved that the plaintiff stated to the defendant, as a reason why he did not wish the negro to be employed about the water, that he was subject to the rheumatism, and could not swim. Jesse Dean proved that he was in the employment of the defendant the year Isaac was hired by him; that the defendant told him to take the boy, Isaac, and a negro boy, Merritt, and go early next morning across the river to the mill and put plank in a kiln to dry. The defendant lived on one side of the river and the mills were on the other. Witness started about day-light. They were in the habit of crossing the river above the dam in a canoe. There were two landings, one higher up than the place from which they started. They found the canoe at the lower landing about thirty or thirty-five feet above the dam. They could safely pass from that landing by going a little up by the bank and then striking across. This had often been done. There was a rise in the river; the water run upon the dam about half way up his thigh. The dam was lower at the middle than at either side. Merritt was a skilful paddler. Witness first entered the boat, then the boy, Merritt, and lastly the negro, Isaac, who pushed the canoe from the bank, and in doing so, instead of pushing off in the usual way, threw the end round so as to turn the bow and place the boat too far out in the stream, and before the boy Merritt could right her, it was found she would go

NASHVILLE,
December, 1839.

Horsely
v
Branch.

over the dam. The dam was about eight feet high, and the current below very dangerous. When they discovered the boat would go over, witness told the negroes to jump out. They all did so. Witness and Merritt walked out on the dam. The foot of negro, Isaac, slipped when he struck the dam, and he went over and floated down a short distance and got on a sand bar. The water was up to the breast. Witness called to Isaac to stand where he was and he would go to him and take him out. After standing a while he seemed to slip off, paddled with his hands, and sunk in a few feet of the bank and was drowned. The foregoing is substantially the proof in the cause, and the bill of exceptions certifies that it contains all the testimony.

The court charged the jury upon the first count, that they were to consider whether any special contract was made or not between the parties. If the negro belonged to the plaintiff, and Horsely hired him from the plaintiff, it was competent for them to make their own contract or bargain, and if they made such special contract, Horsely would have no other right than such contract conferred, and if he used the negro in a manner different from that pointed out in the contract it would be at his own risk, because in hiring, the owner of the negro may limit the power of the hirer, and if the hirer appropriates the property hired in a manner different from that pointed out in the contract and it should be lost, it is just and right that the hirer should lose it, because it is as though no contract were made between them, the consent of the owner being wanting to the act. The jury should consider whether there was any such contract, and whether the defendant misapplied the negro; if so, he was liable if the negro was lost. The jury must therefore look to the proof and see if there was a special contract as stated; if there was, and the defendant used the negro in a way the contract did not authorize, and the negro was lost, it would be his loss and not the plaintiff's. The charge of the court on the second count was satisfactory to both parties.

After stating the substance of the third count, and explaining the nature of the action of trover, the court remarked to the jury in substance: "To come to a correct conclusion on

this count, you must again advert to the proof and see whether there was a special contract between the parties. If the contract was a general one, the hirer is, in law, the temporary owner, and trover will not lie for mere neglect or abuse of the thing hired; but if there was a special contract, and if the defendant used the negro in a manner different from the terms of the contract, trover will lie, because such act of the hirer would be an illegal assumption of ownership, and would be a conversion in law. Whether there was such a contract and breach you must determine from the evidence. If there was, you must, under this count, find for the plaintiff and assess his damages; if there was not, then, so far as this count is concerned, you must find for the defendant. If the jury should believe there was a special contract, and a breach thereof by the defendant, then the defendant would be guilty of a conversion and liable in trover, even though the jury should believe the negro was lost subsequent to such violation of the contract, and under circumstances which would not be a violation of the contract, unless the jury believed the plaintiff waived the violation of the contract, of which the jury must be the judges from the testimony in the cause. It would be competent for the plaintiff to waive any particular breach of the contract, and not the benefit of the contract generally. Whether he did or not, it is for you to determine from the proof."

NASHVILLE,
December, 1839.

Horsely
v
Branch.

The jury found a verdict for the plaintiff upon the first count, and assessed his damages to one thousand dollars, and a verdict for the defendant upon the second and third counts. The defendant moved for a new trial, which was refused, and judgment rendered for the plaintiff, to reverse which this appeal in error is brought.

1. The first and principal question is, whether the evidence applicable to the first count of this declaration warranted the jury in finding a verdict upon that count. This count states a special contract of hiring and an application of the property in a manner different from that agreed on, whereby the negro was drowned and lost to the plaintiff. The agreement proved corresponds substantially with that stated. It was that "Isaac was not to work in or about the water, but

NASHVILLE,
December, 1839.

Horsely
v
Branch.

place, and did not return until long after the time fixed in the contract. The court very properly decided that, according to the facts, the plaintiff had misconceived his action. For riding the horse to a different place than the one agreed on, he had violated his contract and had been guilty of a conversion of the property, for which he was liable in trover and not in case. But the court never thought of deciding that counts in case might not be well joined with a count in trover. The contrary is too well settled to require discussion here.

4. It is next insisted that the first count is bad, and that the judgment ought to have been arrested. It is unnecessary to enter upon an examination of the authorities upon this point. It is enough to say, that although somewhat inartificial, and possibly bad on demurrer, still there is no defect that would not be cured by a verdict.

5. Exception is taken to the charge of the court upon the third count because his honor said, "if the jury should believe there was a special contract and a breach thereof by the defendant, then the defendant would be guilty of a conversion and liable in trover, even though the jury should believe the negro was lost subsequent to such violation of the contract, and under circumstances which would not be a violation of the contract." This part of the charge is in strict conformity to the opinion of this court in the case of *Angus vs. Dickinson*, Meigs' Rep. 460.

This doctrine is founded upon reasons which cannot be controverted. Whenever the hirer, who has made a special contract, violates that contract by a misapplication of the property hired, having no authority by his contract so to apply the property, it is the same thing, so far as that use of the property is concerned, as though there were no contract, and the party had, without the semblance of authority, assumed the ownership and control of another man's property. Being thus guilty of a conversion of the property, he is instantly liable to an action of trover for its value. It is therefore manifest that the plaintiff's right to a recovery being complete, cannot be affected by any question as to the subsequent loss of the property. It is supposed this liability would

not exist in the case of a negro who had been hired for a year, because it is said the hirer would not have a right of possession until the end of the year, and therefore could not, until then, maintain trover, and that he would then be bound to receive the negro if delivered. In support of this position the case of *Caldwell vs. Cosen*, 9 Yer. 262, is cited. That was a case where the property had been taken out of the possession of the hirer by a third person. The court said that the general owner, not being entitled to possession, could not maintain trover against such third person who had been guilty of the conversion. But the present case is wholly different: here the hirer himself is guilty of the conversion; having made the property his own, and by his violation of the contract having put an end to it, he is instantly liable to the action of the owner. We think, therefore, the entire charge on the third count is correct.

NASHVILLE,
December, 1838.

Horsey
v
Branch.

Let the judgment be reversed, and the cause be remanded to the circuit court of Maury county for another trial to be had therein.

NASHVILLE,
December, 1836.

M'ALISTER vs. OLNSTEAD, *et als.*

M'Alister

v

Olmstead.

M'Alister, by will, appointed Nichol guardian of his children and executor, and died. Nichol qualified as executor, but did not take upon himself the duties of guardian; but, after acting as executor of the will six years, renounced the guardianship. Olmstead was appointed guardian and receipted in full to Nichol for the entire estate: Held, that the appointment of Olmstead was legal and valid, and that though Nichol was named guardian in the will, and may have done an act appropriate to the character of guardian, that did not make him such.

One of the heirs died without issue, and no letters of administration were ever taken out upon his estate. Olmstead received his portion as guardian: Held, that Olmstead was liable for all that he received as the property of his wards. The guardian is not permitted to contest the validity of his wards' title to the estate which he received as belonging to them. Whatever he received he is bound to account for.

The securities of a guardian are liable to the full extent of his obligation.

The proper mode of taking an account is to allow as credits to the guardian such sums as were properly paid and for which there were vouchers produced; and where no vouchers were produced, to have heard proof and to have allowed such credits as were reasonable for boarding, tuition fees, clothing, &c. &c.

Where the general result of an account taken is correct, the court will not reverse, though there may be some partial errors in the taking of the same on both sides.

Perkins and Olmstead drew a joint bill on a commission house in New Orleans for the benefit of Olmstead. Perkins paid the money and prayed that it might be allowed as a set off against the claims of complainants: Held, that it not appearing that it was agreed at the time the draft was drawn that Perkins should pay the draft, and that the payment should go towards the discharge of his bond in the hands of the administrator, the credit could not be allowed.

If Perkins advanced this sum of money to Olmstead for his private purposes when he knew that Olmstead was insolvent, with an agreement that it should be applied in extinguishment of a debt due to him as trustee, this would constitute Perkins particeps in a fraud upon the complainants, and he would be held liable for the amount, notwithstanding the agreement that it should be considered as a payment.

This bill was filed by a portion of the heirs and devisees of Charles M'Alister, deceased, in the chancery court at Franklin, Williamson county, on the 12th day of January, 1837, against their guardian and his securities, for an account.

Charles M'Alister, a citizen at the time of his death of the

town of Franklin, Williamson county, made his last will and testament on the 7th day of October, 1818, and died in some short time thereafter. His will, at the October sessions of the county court of Williamson, 1837, was admitted to probate and duly recorded. He left a widow, Elizabeth M'Alister, and five children, John, Frances, (who subsequently intermarried with Humphrey Marshall,) Josiah, James, William and Charles M'Alister. The decedent disposed of his earthly estate as follows: "I do hereby devise to my dear wife all my real estate in the town of Franklin during her life or widowhood, and at her death or intermarriage I devise the same to my children or the survivors of them. I do also bequeath to my said wife all my slaves, all my household furniture, and the dividends or proceeds of all my bank stock; but if she should marry, then and in that case, it is my desire that she should have only one-half or a moiety of my slaves, and all my household furniture, and no more of the proceeds of my bank stock than she may have received of dividends previously. It is my desire that out of the proceeds of my bank stock and the use of my slaves my children be educated and supported during the widowhood of my said wife, if said funds be deemed sufficient for that purpose by my executor hereafter named; but if not, then it is my desire that my executors draw for and appropriate so much of my property as they may deem sufficient to supply the deficiency of education and support of any and all my children. It is my will and desire that the balance of my property, except as hereinbefore excepted and qualified, be equally divided between my children. I do appoint my friend John Nichol, merchant, of Nashville, guardian of my children. I do appoint John Nichol executor, and my dear wife executrix, of this my last will and testament."

John Nichol and Elizabeth M'Alister qualified according to law as executor and executrix, but no evidence appears in the record that Nichol ever took upon himself the duties and office of testamentary guardian of the children under this will. It appears that Charles M'Alister died possessed of the following real estate, to wit: a store house and dwelling house in the town of Franklin, a small framed house, and

NASHVILLE,
December, 1838.

M'Alister
v
Ormshead.

NASHVILLE,
December, 1825.

M'Alister
v
Olmstead.

some out lots, and a tract of land of about one hundred acres in the county of Williamson, of inferior quality; that he died possessed of two thousand dollars of stock in the Nashville Bank, seven slaves of medium value, besides a considerable amount in notes, bonds and money, in which his estate chiefly consisted. In 1822 Josiah died a minor, without issue, and no letters of administration were ever taken out upon his estate. In 1823, M. D. Cooper, John M'Alister and H. Petway were appointed commissioners by the county court of Williamson county to settle with the executor and executrix of John M'Alister, deceased, who found a balance in the hands of John Nichol of twenty-four thousand four hundred and eighty-eight dollars thirty-seven cents in notes, obligations and judgments. This settlement was produced at the January sessions of the county court of Williamson county, read and ordered to be recorded, which was done accordingly. On the 4th day of September, 1823, Elizabeth M'Alister, the widow of Charles M'Alister, deceased, intermarried with Charles G. Olmstead, a citizen of Williamson county at that time. At the July sessions of the county court of Williamson, in 1825, the following entry was made on the records of said court:

"State of Tennessee, Williamson county court, July sessions, 1825. July 9th, 1825. John Nichol, one of the executors and appointed testamentary guardian for the children of Charles M'Alister, deceased, appears in court and renounces said guardianship."

A full and final settlement was made at this court by commissioners with John Nichol. Charles G. Olmstead was appointed guardian of the minors of M'Alister, deceased, of which an entry was made on the records of the county court in the following words:

"State of Tennessee, Williamson county court, July term, 1825. Charles G. Olmstead is constituted and appointed guardian of John D. M'Alister, Frances M'Alister, Charles M'Alister, James M'Alister and William M'Alister, minor orphans of Charles M'Alister, deceased, who gave bond of sixty thousand dollars, conditioned for his faithful guardianship, with Thomas H. Perkins, Nicholas Perkins, senior, Ar-

chibald Lytle, William E. Owen and Lemuel Donaldson his securities."

NASHVILLE,
December, 1825.

M'Alister
v
Olmstead.

At and during the same court a settlement took place between Nichol and Olmstead, Nichol as executor and Olmstead as guardian, appointed as aforesaid, upon the conclusion of which Olmstead executed to Nichol a receipt, which was in the following words:

"Received of John Nichol, executor of Charles M'Alister, deceased, the whole amount of the notes, cash in hand, negroes, bank stock and lands spoken of in the schedule, being the whole of the estate which came to the hands of said John as executor of the last will and testament of Charles M'Alister, deceased, and likewise the whole of the estate which belongs to the children and legatees of the said Charles. July 11th, 1825. CHARLES G. OLmSTEAD,

Guardian of the heirs of Chas. M'Alister, dec'd."

This receipt was acknowledged in the county court as a part of the settlement of the executor, and was ordered to be recorded and was recorded accordingly.

Upon the settlement aforesaid, subsequent to the marriage of Olmstead with the widow of the testator, the negroes were divided in accordance with the provisions of the will, and Olmstead, in right of his wife, assumed the ownership of half of them, and claimed one-sixth of the estate of the deceased minor, Josiah. Olmstead made a settlement with Humphrey Marshall, in right of his wife, Frances, and John M'Alister, for their interest in the estate, and it appears that they were satisfied in regard thereto.

At the July sessions of the county court of Williamson, 1826, Olmstead made a return of the state and condition of the estate of the heirs of M'Alister, deceased, in his hands, and returned in his hands the sum of twenty-nine thousand nine hundred and fifty-three dollars and sixty-five cents, giving in his account a detailed statement and swearing to the truth of the same before that tribunal, in pursuance of the act of the assembly in such cases. This was the only return ever made by him as guardian. He engaged subsequently in merchandising in the town of Franklin upon the monies and effects of the minors in his hands, with a relative of his as a

NASHVILLE,
December, 1839.

M'Alister
v
Olmstead.

partner. The partner becoming dissipated, the adventure turned out disastrously; and large sums were lost also in speculations in the article of cotton. He made, at the instance of Mrs. Olmstead, valuable improvements on the real estate of the heirs in the town of Franklin. The minors (the boys) as they grew up, became headstrong, ungovernable and reckless in the expenditure of money, and the guardian expended sums for them time after time, without keeping any regular account of their transactions. In 1832 Mrs. Olmstead died, and Olmstead, finding his affairs in a state of irretrievable confusion, left the State of Tennessee for the State of Kentucky, in 1836.

The complainants, William, James and Charles M'Alister, minors still in 1837, by their next friend, Gilbert Marshall, chairman of the county court of Williamson, filed this bill in the chancery court at Franklin, against Charles G. Olmstead, William Donalson, administrator of Lemuel Donalson, deceased, William E. Owen, Thomas H. Perkins and Archibald Lytle, the securities of said Olmstead for the faithful performance of his duties as guardian according to law, praying a decree for an account of the estate of the testator. The bill charges that the guardian had returned in 1826 that he had twenty-nine thousand nine hundred and fifty-eight dollars and sixty-five cents in his hands, exclusive of the real estate and the rents thereof, the slaves and their hire, and the bank stock and the dividends thereof; that he had settled with Humphrey Marshall in right of his wife, Frances, and with John M'Alister, and that no return had been made since 1826, and that they were in actual sufferance for the want of the necessaries of life, and that they were unable after repeated applications to obtain a settlement with him, or even a statement of the condition of the estate; that Olmstead was reputed and believed to be insolvent, and had abandoned the State of Tennessee and had gone to the State of Kentucky.

The bill further charges that Olmstead had loaned a large sum of complainants' money to Thomas H. Perkins, one of the said Olmstead's securities, and prayed that said Perkins be enjoined from paying over the said sum so loaned in dis-

charge of any debts he might be bound to pay as the security of said Olmstead under a different liability. They pray that some fit person be appointed their guardian; that some allowance be made them for immediate support, &c.

NASHVILLE,
December, 1838.

M'Alister
v
Olmstead.

The clerk and master, at the April term, 1838, was, by an interlocutory order, directed to report instantly what would be a suitable maintenance for each of the complainants. The clerk reported that it would require six hundred dollars per annum to support Charles, he being then lately married, and three hundred dollars per annum for each of the others.

This report was confirmed, and James Parks was appointed guardian, and ordered, if necessary, to sell such portion of the bank stock as he might deem necessary to raise such sums of money before mentioned. The court also directed suits at law to be instituted against Thomas H. Perkins on certain notes in the hands of Parks, given by Perkins to Olmstead individually, and by him deposited amongst the papers of his wards as a portion of their estate. By consent of parties Humphrey Marshall and wife were made complainants.

The defendants answered separately. William Donalson stated that he had no personal knowledge of the transactions detailed in the bill, and prayed for strict proof thereof.

Thomas H. Perkins stated that he knew that the decedent, M'Alister, died possessed of a large property, real and personal, but what amount in value or what in specific articles he knew not; that John Nichol was appointed by the will of the decedent guardian of the complainants; he admits that he executed a bond with Charles G. Olmstead and Nicholas Perkins, Lemuel Donalson, Archibald Lytle and William Owen, called in the bill of complainants a guardian bond, but whether or not the county court of Williamson county had jurisdiction at the time of the execution of said bond to appoint a guardian for said children, and whether said Olmstead was duly and legally appointed guardian or not, and whether the said bond was a good and valid bond, and whether he was responsible thereon in this court, be submitted to the court and required the complainants, he being an innocent surety, to bring themselves within the rules of law be-

NASHVILLE,
December, 1839.

M'Atister
v
Olmstead.

fore they obtained the relief sought by this bill, &c. He stated that he did not know what amount came to the hands of Olmstead. He further stated that he, together with one Nicholas P. Smith, as trustee for Nicholas Perkins, deceased, purchased of Olmstead a number of slaves, for which they executed their notes to said Olmstead bearing date the 15th July, 1829, one for the sum of nine thousand five hundred and twenty-nine dollars and sixty-one cents, due on the 15th July, 1830, and another for the sum of five hundred dollars, due on the 15th July, 1830, the third for the sum of one hundred and forty dollars and thirty-nine cents, upon which several notes he had made several large payments. He stated that in March, 1836, and before the filing of this bill, he, as the security of said Olmstead, drew a bill jointly with said Olmstead, on Brander, McKenny and Wright, commission merchants, of New Orleans, for the sum of three thousand two hundred dollars; that suit was instituted against him by said commission merchants in the federal court at Nashville, and judgment recovered against him for the sum of three thousand four hundred and ninety dollars and twenty-five cents and costs of suit, on the 24th day of October, 1837. He prayed that he might be allowed the amount of said judgment as a set off against the notes aforesaid.

A. Lytle answered and stated that he knew but little in regard to the matters alleged in the bill, and required proof thereof. He admits that Olmstead intermarried with the widow of the testator, and was appointed guardian of the complainants by the county court of Williamson; that a bond was executed by Olmstead and the securities as therein stated, but alleges that the testator, by his will, appointed John Nichol testamentary guardian of his children, and prays the judgment of the court upon the question whether the county court had power to appoint a guardian unless the said John Nichol had declined to act or had been removed by competent authority. He states that Olmstead had expended large sums of money for the benefit of the complainants, and that an account ought to be taken of such sums for the benefit of securities. This defendant also insisted that complainants could not have a decree for the part of the deceased child, Jo-

siah, without an administration was taken upon the estate of NASHVILLE,
December, 1839.
said deceased Josiah.

M'Alister
v
Olmstead.

Charles G. Olmstead filed his answer. After admitting that he was appointed guardian of the complainants by the county court of Williamson, he stated that Nichol was appointed testamentary guardian by the will of M'Alister, deceased; that he had taken upon himself the office and duties of guardian, and continued guardian for six years or thereabouts; that he had not renounced to a competent authority, and that the appointment of respondent was a void act. He admitted that he made the report as set forth in the bill of complainants; alleged that he had embezzled or concealed nothing; that he was then in a state of utter destitution; that he had embarked with the monies of complainants in cotton speculations and in merchandise, and that his adventures had proved disastrous; that he had kept no regular accounts of the expenditures of the complainants, but that they had been enormous; that they were extravagant, headstrong, dissolute and reckless, and that he was entitled to the largest credits for expenditures made for them; that he had settled fully with H. Marshall in right of his wife, Frances, and with John M'Alister; that he had made valuable improvements upon the dwelling house of the testator, which belonged to his heirs, for which he prayed allowance be made in the account; he insisted that the devises and bequests in the will, conferring upon the widow of the deceased certain real and personal property so long as she remained a widow and forfeiting half thereof in the event that she married, were in restraint of marriage and contrary to the policy of the law, which is to encourage marriage, and therefore void by reason of the condition attached; and that "the true interpretation of the devise of the real estate was that a life estate in the same was given to the widow at all events, and that the bequest of the personal property was to the widow absolutely." He stated that the provision in the will of the deceased was totally inadequate for the support and education of the children. He stated that he loaned between nine and ten thousand dollars, belonging to complainants, to Nicholas Perkins, and took a note and deed of trust upon his slaves for the re-

NASHVILLE,
December, 1839.

M'Alister
v
Olmstead.

payment of it. In order to raise the money he sold the said slaves to N. P. Smith and Thomas H. Perkins. The sale under the deed of trust was the source of the three notes, one for the sum of about nine thousand dollars, one for about five hundred dollars, and the other smaller; that the smaller note belonged to the estate of Nicholas Perkins, deceased, and the other two to complainants. Such is the substance of his elaborate answer.

Replications were filed to these answers and proofs were taken, and the cause came on to be heard before the honorable L. M. Bramlett, chancellor, at the October term, 1837, of the chancery court at Franklin, upon the said bill, answers, replications and proof, who thereupon decreed and directed that the clerk and master should take an account of all the property and effects of Charles M'Alister, deceased, which went into the hands of C. G. Olmstead as guardian, and report what disposition had been made thereof; that he ascertain what sums were due each of the complainants, giving the guardian all just credits; and that as to all monies received or which should have been received by said guardian, and which remained in the hands of said guardian, should be charged with interest compounded annually. He further directed that in taking said account the clerk and master should ascertain when the said Charles G. Olmstead intermarried with the widow of said M'Alister, and when he became chargeable with the rents of the real estate and the hire of the negroes in accordance with the provisions of the will, and charge said guardian accordingly, with interest compounded annually as aforesaid, giving all just credits. He further directed the clerk and master to report the number of heirs and legatees said M'Alister left; when Josiah died; what became of his estate; and all other facts and circumstances in relation thereto. He was also directed to report if the testamentary guardian of the orphan children and legatees of Charles M'Alister, deceased, acted as such or took upon himself the office and duties of guardian, and if he did, how long, &c. The question whether the securities were chargeable with compound interest was reserved, and all other questions.

The clerk and master made his report on the 15th of October, 1838, in which he set forth the facts substantially as above set forth. He reported that Nichol had never taken upon himself the office and duties of testamentary guardian, but had renounced as above stated; that he had adopted as the basis of account the return of Olmstead in 1826 to the county court of Williamson; that he had deducted therefrom one-sixth, as the portion of Olmstead in right of his wife, in the estate of the deceased minor, Josiah; that he had allowed all just credits; that he had taken an account in connexion with the return of 1826 of the hire of the slaves and rents of real estate, in accordance with the interlocutory decree of the court; that he had not allowed Olmstead any thing for improvements; that he had allowed the defendant credits for the support of the children, including all expenses for the first two years of his guardianship, two hundred and seventy-five dollars per annum, and for the remainder of the time he acted as guardian four hundred dollars per annum; that the guardian had kept no regular accounts, and that he found much difficulty in ascertaining the proper sum which should be allowed him therefor, but reported the following as the result of his investigations: due Charles M'Alister, the sum of seven thousand one hundred and nine dollars and eighty-four cents; James M'Alister, eight thousand one hundred and forty-nine dollars and nineteen cents; Wm. M'Alister, eight thousand eight hundred and eighty-seven dollars and fifty-eight cents.

NASHVILLE,
December, 1839.

M'Alister
v
Olmstead.

This report was excepted to by complainants and by defendants, and the exceptions coming on for argument and argument being had, the court determined that the defendant Olmstead, as the guardian of the complainants, and the other defendants, as the securities of said Olmstead as guardian, were responsible to and bound to account with the complainants for the execution of the trust of guardian of complainants, by virtue of his appointment as such guardian by the county court of Williamson at the July term, 1826: and the court sustained the exception of the complainants to the sums allowed the guardian, in the absence of vouchers, for the support of said minors annually as being too large, and

NASHVILLE,
December, 1839.

M'Alister
v
Olmstead.

also sustained the exception to the allowance of one-sixth part of Josiah's interest to Olmstead in right of his wife, and reserving the questions arising on the exceptions of the defendants, ordered the clerk and master to amend his report in conformity with the opinion of the court, and to take such other and additional testimony as to any and all credits to be allowed the defendant Olmstead for the boarding, maintenance, education and support of said minors, &c. and in the absence of vouchers to ascertain what would be a reasonable allowance therefor. He was also directed to ascertain and report to the court whether any, and if any, what sums of money Thomas H. Perkins was indebted to Charles G. Olmstead as the guardian of complainants.

At the October term, 1838, the death of Thomas H. Perkins was suggested, and complainants filed their bill of revivor against Nicholas Perkins, administrator *pendente lite*, of Thomas H. Perkins, deceased, and on motion, at the April term, 1839, it appearing to the court that a copy of the bill of revivor and subpoena had been served on the administrator, the bill was ordered to be revived against said Perkins, and said Perkins having failed to answer, the bill was taken as confessed and set for hearing. The court revived the orders of the October term, 1838, and at the October term, 1839, the report of the clerk and master came in. He reported that Thomas H. Perkins, deceased, was indebted to the said guardian the sum of nine thousand two hundred and eighty three dollars and eighty-one cents, and modified his previous report in conformity with the decree of the court. The court, on the exception to the report, allowed the guardian credit for the improvements placed on the real estate one-sixth of their estimated value, and refused to allow the guardian for any sums except those expended and for which vouchers were produced; refused to allow the defendants a credit for Josiah's part; refused to allow the guardian any compensation; allowed the complainants interest annually compounded. Exception being filed as to the allowance of compound interest on the sum due after the removal of Olmstead and the appointment of Parks, the exception was overruled; and upon exception being taken

NASHVILLE,
December, 1839.M'Alister
v
Olmstead.

by complainants to that part of the report which disallowed compound interest on that part of the fund designated as Josiah's part, the exception was overruled; and upon the report so corrected and modified, in conformity with the opinion of the court, the court decreed that Charles M'Alister recover of the defendants the sum of eight thousand two hundred and sixty-five dollars and sixty-four cents, with interest from 9th November, 1839, William M'Alister the sum of nine thousand six hundred and sixty-four dollars and eighty-two cents, with interest from same date, and James M'Alister nine thousand six hundred and eighty-two dollars and sixty-two cents, with interest from same date and costs of suit. The court further decreed that Nicholas Perkins pay the sum of eight thousand one hundred and seven dollars and forty-six cents, the amount borrowed of the guardian, Olmstead, by T. H. Perkins, and that said sum when paid be credited *pro rata* upon the several sums due respectively to complainants. From this decree the defendants appealed.

Ewing, for defendants. The defendants are not responsible upon their bond in this court. Charles G. Olmstead was not guardian of the complainants; John Nichol was appointed testamentary guardian; by proving the will and taking out letters he accepted all the trusts of the will. 4 Cond. E. Chancery Reports, 93: 10 Yerger's Reports, 263. One of the trusts was a guardianship of the children; Nichol kept the estate six years, and acted in all respects as guardian. After a lapse of two years from his acceptance of the trust of the will he is to be regarded as guardian. *Governor vs. Bosley*, 6 Yerger, 220. Nichol never resigned his office of guardian. What is called a resignation or renunciation in or to the county court was a nullity. Whatever power the county court might have with regard to guardians appointed by itself that court could not receive the renunciation of a testamentary guardian. Nichol could only have renounced his guardianship by not becoming executor or by renouncing such executorship, or, having once acted, by renouncing his trusts to the chancery or circuit court. There could not be

NASHVILLE,
December, 1839.

M'Alister
v
Olmstead.

two guardians at the same time deriving their authority from different sources. Olmstead would be liable as an intruder and the securities would be liable on this as on a voluntary bond. The remedy against Olmstead might be in a court of chancery, and he might be treated as guardian, but against the securities the remedy would be at law. The intrusion was subsequent to the bond. It follows if this be so that the securities would not be such for one who was a statutory guardian, and therefore not liable for compound interest. According to the case of Deaderick and Wharton compound interest would be given against the defaulter but not against the securities.

2. The securities insist that they are not liable for the share of Josiah M'Alister, deceased, if Olmstead be declared guardian, as his share was received without the intervention of an administrator, and was in his hands therefore not as guardian but as executor *de son tort*. In this character he will not be allowed to distribute. 2 Murphy: 4 Paige, 48: 2 Maddux, 394: 10 Yerger, 371: 10 Yerger, 383. He is liable to the rightful administrator. Olmstead should have reduced this share to possession it is said. This may be true, but surely he was not bound to administer for that purpose. But it is said he receipted for it as guardian. What principle of law prohibits him and securities from going behind the receipt and proving the truth as it exists? It would be no answer either in law or equity to a rightful administrator of Josiah to reply that he had distributed the avails of Josiah's interest to the rightful distributees; Josiah might have created debts; to these a distribution would be no bar. This question is fully settled by the authorities referred to.

3. A larger allowance should have been made Olmstead for the support of these children; from their character, their property and their station in life a less expense than that set down for the various years could not well occur; that Olmstead did expend more upon them than these sums there is not a shadow of doubt. The allowance in no year exceeds the income; and where the income is not very large, if the guardian keeps within it during the entire minority of his wards, the court should be satisfied. It is apparent in this

case that vouchers have not been kept for all payments, or if kept that many of them have been lost. It is impossible for a guardian to keep vouchers for every thing, yet allowances are constantly made without vouchers. In the absence of vouchers, where it is most evident that expenditures were made, proof should have been heard and reasonable allowances made. The improvements are such as a court of chancery would have sanctioned, and being now made without the order, an allowance should be made for a permanent and useful improvement of the real estate of the wards.

NASHVILLE,
December, 1839.

M'Alister
v
Olmstead.

4. The draft paid by Perkins was a transaction between Perkins and Olmstead in his individual character, and it would be the consummation of a gross breach of trust by Olmstead, and a fraud by Perkins, to allow the amount of the draft as a credit on the note of Perkins.

Campbell, for complainants. 1. The clerk and master reports that Nichol never took upon himself the office and duties of guardian, and there is no proof that he ever did. He renounced in the county court, and Olmstead was appointed and gave bond as such and gave the defendants as securities. They are estopped from denying their own acts of record.

2. Olmstead received of the executor of M'Alister all the estate of said M'Alister as the property of his wards for whom he was appointed guardian; he gave his receipt for it to Nichol as guardian; he returned it to the county court as guardian, and held it during a series of years as guardian. The court will not now permit him to pick a flaw in the title of his wards to the property so received and so returned, and set up as a defence against the claims of complainants that a portion of the property will belong to the administrator of Josiah when he shall be appointed. A guardian enters upon land for his ward, receives the rents and profits as guardian: will it be pretended that the court should permit the guardian to evade an account of the rents and profits of the land by alleging an outstanding title in some third person to the land which has not been asserted? surely not; it is his duty to sustain and support the title of his ward's property. Story

NASHVILLE,
December, 1839.

M'Allister
v
Olmstead.

on Agency, 8, 9, 209: S. 217. The defendants urge that complainants claim the property as the distributees of Josiah, and that they can only recover it through the medium of an administrator. That point does not arise in this case. Olmstead received this property as the property of his wards and as their guardian, and was returned to the proper court as such, and complainants say that the law does not permit him to gainsay his own recorded acknowledgments.

3. The defendants further urge that Olmstead became executor in his own wrong by intermeddling with Josiah's part. This is not so. 1 Williams on Executors, 140.

4. There is another ground upon which Olmstead is liable. A guardian is bound to secure the property of his ward. If a loss occurs to his ward by his negligence he is responsible. Olmstead, if he was guardian, was bound to collect and account for Josiah's part. Josiah was an infant, owed no debts, and Nichol paid his portion in accordance with law into Olmstead's hands. If Nichol had notified Olmstead that he had Josiah's part and Olmstead did not receive it, and the share was subsequently lost by the insolvency of Nichol, Olmstead would have been bound for it.

5. The accessory obligation follows the principal. Whatever was Olmstead's duty to do as guardian the securities are bound for the performance of that duty. If Olmstead received property as guardian and is bound therefor, so are his securities. If it be the duty of Olmstead to secure and improve the property of his wards his securities are bound for the faithful performance of that duty.

6. The complainants excepted to the report of the clerk and master; and the decree of the court in confirmation thereof is this: The testator provided in his will a fund for the support and education of his children; the guardian paid for his wards money raised out of the general property, and not from the fund designated by the testator; the court has allowed him all the money he paid. This was erroneous. If the fund set apart by the testator was insufficient he should have filed his petition in chancery, made known the fact, and procured a legal appropriation of other funds to the support

and education of the minors, if in the judgment of the court it was necessary. NASHVILLE,
December, 1839.

7. The defendants except to the report of the clerk and master, and the decree of the court in confirmation thereof in this, the defendants were not allowed for monies alleged to have been paid by the guardian for which payments no vouchers were produced, and were not allowed an annual sum for defraying expenditures. This was correct. The law requires the guardian to keep regular accounts with his wards, to make settlements annually, and when he does settle to produce his vouchers. If the law authorized the course insisted upon by the defendants it would lead to the most extensive frauds upon the estates of minors. The court will not permit the guardian to take advantage of his own neglect, and supercede the rules of evidence pointed out by law:

M'Allister
v
Olmstead.

Alexander, for Thomas H. Perkins, administrator. 1. The clerk has reported the note of one hundred and forty dollars and thirty-nine cents and the note for five hundred dollars, both given to Olmstead individually, as belonging to the wards' estate. They are given to Olmstead individually, and the presumption therefore is that they belong to him. The answer of Olmstead is not evidence against his co-defendant, Perkins, and should not be regarded as establishing the ownership of the notes.

2. The clerk and master reported against payments which should have been allowed, and the court confirmed the report disallowing them. A payment made by Perkins to Olmstead is presumptive evidence of payment of an antecedent debt, and not of a loan. 2 Starkie, 1090. Perkins was not bound to take care that the money was properly applied where, the trust was of a general nature, as the case here was. 2 Story's Eq. 384-5.

The chancery court directed a trial at law in the first instance to test in the proper tribunal the credits claimed on these notes. T. H. Perkins died and the court directed the clerk and master to report on the question as to whether the payments should be allowed as credits. He reported against them, and the court confirmed the report. The cause was

NASHVILLE,
December, 1839.

M'Allister
v
Olmstead.

thus transferred from law to equity. This was erroneous, because: 1st. In the suit brought on these bonds by complainants, at law, they had full, effectual and complete remedy. 2d. In the case at law, Olmstead being the payee of all the notes, suits would necessarily be instituted in his name for recovery. To bring this case now into equity would be changing the parties so to affect the application of the rules of evidence. This cannot be done, as it would be depriving the defendant of his legal rights. Equity follows the law in such cases. *Grisley's Evidence*, 34: *Story's Eq.* 394-5-6: *Norris Peake*, 34: 2 *Starkie*, 39, 40: 7 *Term Rep.* 663: 7 *Term Rep.* 670: 7 *Yerg.* 297.

GREEN, J. delivered the opinion of the court.

1. Was Olmstead's appointment as guardian legal? We think it was. Although Nichol was named guardian as well as executor in the will, that did not make him such; and not having assumed the performance of the duties of guardian, but on the contrary renouncing that character in court, we cannot consider him such because he may have done an act appropriate to the character of guardian.

2. Are the securities liable for Josiah's part of the estate? We cannot criticise the settlement between the executor and guardian to see if he received more than his wards were entitled to of the estate. Whatever he received for them he is bound to account for to them. It would be monstrous if a guardian were permitted to contest the title of his wards to the estate he may have received for them in his character of guardian, upon the ground that he had received more than they were entitled to. If Nichol paid to this guardian, for his wards, money which a future administrator of Josiah may be entitled to demand, certainly this guardian is not responsible for it, but Nichol (if any one) would have to answer to such administrator. The question, therefore, whether this share could have been received without an administrator, does not arise. Olmstead received the fund as guardian and is bound to account for it, and his securities are liable to the extent of his obligation.

3. Probably the more satisfactory manner of taking the

NASHVILLE,
December, 1839.M^r Allister
v
Olmstead.

account would have been to have allowed such sums as were properly paid, and for which there were vouchers produced, and where no vouchers existed, to have taken the proof and made such allowance as was reasonable. The decree making the last reference authorized this course; and where no voucher existed for the payment of boarding, proof was made as to what was reasonable, and that sum was allowed. It is true, that for some years the allowance was small, but the defendant's answer and the proof show they boarded part of the time where very little was paid. On the other hand the allowances for some of the years' expenses are extravagantly high, and such as ought not to have been made, had a full allowance been made for each year. The average expense of the lowest is about two hundred and forty dollars per annum and of highest about three hundred and fifty dollars. This we think an ample allowance; and although strictly some of the details of the account may be erroneous on both sides, we consider that the result does ample justice to the defendant, and therefore will not, for the sake of attaining the same end by a somewhat different process, alter it.

4. The proof does not satisfy us that Perkins and Olmstead agreed, at the time the draft on the New Orleans house was drawn by them, that Perkins should pay the draft, and that it should go towards discharging the bond Olmstead held, as guardian, on Smith and Perkins. It is very probable Perkins the more readily became bound for Olmstead from the knowledge that he owed him this money; but, unless it was agreed (and we think it was not) that the sum for which the bill was drawn should be a payment of the note, the payment of it afterwards by Perkins could not entitle him to claim a credit on the note for that sum. Indeed, if he advanced this sum to Olmstead for his private purposes when he knew he was insolvent, with the agreement that it should be applied in extinguishment of a debt due as trustee, thus enabling him to commit a gross breach of trust, it is difficult to perceive how he could have been excused from liability therefor to the *cestue que trust*. Let the decree be affirmed.

NASHVILLE,
December, 1839.

LAWRENCE vs. THE STATE.

Lawrence

v

The State.

Lost property cannot be the subject of larceny. *Porter vs. The State*, M. and Y. 226.

Muirhead placed his pocket-book upon the table of a barber's shop, there to remain till he could get a bank bill changed, and on leaving the shop he forgot to take his pocket-book, but upon missing it he immediately recollected that he had left it at the barber's shop: Held, that this pocket-book, at the time it was so left, was not "lost property" in the sense used in the law books, and was the subject of larceny.

At the June term, 1839, of the circuit court of Wilson county, the grand jury of the county indicted John Lawrence, a free man of color, for stealing bank notes of the value of four hundred and eighty dollars, the property of John Muirhead. He pleaded not guilty, and the cause was submitted to a jury, his honor E. A. Keeble, special judge, presiding, when it appeared in proof that the prosecutor, Muirhead, on the 12th March, 1839, walked into the shop of Lawrence, a barber in the town of Lebanon, and having had his hair trimmed, took out his pocket-book, and handing a bank bill to the barber, out of which to take his compensation, he placed it on the table. The barber left the shop to get the bill changed, and a fight occurring in the streets, the prosecutor's attention was arrested thereat and he left the shop, his pocket-book lying on the table. The prosecutor did not miss the pocket-book till he was undressing for bed, when he immediately recollected that he had left it at the barber's shop. He returned to the shop, the pocket-book was gone, and search being instituted it could not be found.

Lawrence brought the money to Nashville and expended it in the purchase of confections, &c. On being arrested, he gave contradictory accounts as to the source from which he procured the money. The money was fully identified.

Under the charge of his honor, which is set forth in the opinion of the court, the jury found Lawrence guilty of grand larceny, and fixed his term of imprisonment in the jail and penitentiary house of the State at eight years, and also returned a verdict against him for the sum of four hundred

and eighty-four dollars, the value of property stolen and appropriated, and interest thereupon.

NASHVILLE,
December, 1839.

Lawrence
v
The State.

The defendant moved the court to set aside this verdict, but the motion was overruled, and judgment rendered that he should be confined in the jail and penitentiary house of the State for the term of eight years from the date of the judgment; that he be rendered infamous and incapable of being examined as a witness, and that he be disqualified from holding any office of profit or honor in the State; and that John Muirhead recover of him the sum of four hundred and eighty-four dollars.

From this judgment of the court defendant prayed and obtained an appeal in the nature of a writ of error to this court.

R. M. Burton, for plaintiff in error. In order to constitute a larceny there must have been committed a trespass by the defendant in the taking and carrying away the property of the prosecutor; and to sustain this position he cited *Porter vs. The State*, M. and Y. 226: 1 Hay. 157, note: *State vs. Braden*, 2 Tenn. 68: *State vs. Wright*, 5 Yer. 154: *Feller vs. The State*, 9 Yer. There can be no trespass without a violation of the possession of the owner at the time of the taking. 1 Haw. 135, note. "There must be an actual severance of the thing from the possession of the owner." 2 East's P. C. 554. In this act of taking there was no severance of the pocket-book from the possession of the prosecutor. It was not in his personal possession, nor in his house, nor in the hands of his agent. It was not in his custody or control, and the testimony proves that he did not know where it was. It was left in the shop of defendant, yet not entrusted to his care, nor left there for safe custody, and not with the knowledge of the prosecutor. This was a case of actual loss.

There is no possession violated, no trespass committed, no larceny perpetrated in the seizure and conversion of lost property. 14 Johnson: 3 Inst. 102, 103: Haw. 134, sec. 3. The reason given by Hawkins for this is sound, to wit, "because the party is not much aggrieved where nothing is taken

NASHVILLE,
December, 1839.

Lawrence
v
The State.

but what he had lost before." If the act of taking lost property be regarded with an eye to the guilt of the taker it is less than the guilt involved in a larceny, for it requires a greater degree of daring turpitude to seize and carry away property from lawful custody than merely to take possession of that which is in the custody of no one. If it be regarded with an eye to the owner of lost property, it is still not the policy of the law to aid negligence and protect indiscretion. Paley's Phil. Ch. on Crimes.

Attorney General, for the State, cited *Hite vs. The State*, 9 Yer. 206, and contended that the pocket-book and money therein contained were within the control of the prosecutor at any moment when his mind should recur to them, if they had been left where he intentionally placed them, and that they were, consequently, at the time of the seizure of them, within the constructive possession of the prosecutor, and the subject of larceny.

REESE, J. delivered the opinion of the court.

This is an indictment for grand larceny. The plaintiff in error was a barber, and had a shop in the town of Lebanon. Muirhead, the prosecutor, went to the shop of Lawrence late in the evening for the purpose of having his hair trimmed. This operation having been performed, prosecutor took out his pocket-book in order to pay the plaintiff in error, and gave him a one dollar bill, but the latter, not having the change, left the shop for the purpose of procuring it, and prosecutor remained. When the prosecutor took out his pocket-book, which contained four hundred and eighty dollars, he laid it upon a table in the shop. On the return of the plaintiff prosecutor met him without the door, received his change and departed. On retiring to bed that night at nine or ten o'clock he missed his pocket-book, and remembered that he had left it on the table in the shop. He then went to the shop, where he found the plaintiff, who denied all knowledge of the pocket-book. The foregoing is a sufficient statement of the evidence with reference to the question discussed before us. Upon this part of the testimony, his

NASHVILLE,
December, 1839.Lawrence
v
The State.

honor, the circuit judge, charged the jury, that if the prosecutor took out his pocket-book in the shop of the defendant and laid it upon the table, and the defendant took it, unknown to the prosecutor, with the intention of converting it to his own use, against the will and knowledge of the prosecutor, and whilst the prosecutor was in the shop, that he would be guilty of larceny. The court further charged, that if the prosecutor had taken out his pocket-book and laid it upon the table at defendant's shop and left it there and went away out of the house, it would still be a sufficient constructive possession in the prosecutor to make the taking and converting it to defendant's use a larceny, if such taking was accompanied with the intention of appropriating the bank notes to his own use without the knowledge, consent or will of the prosecutor. The defendant having been convicted by the verdict of the jury, and having moved the court for a new trial, which was refused, he brings his writ of error before this court; and here it has been argued with much zeal and ingenuity by his counsel upon the authority of Long's case, 1 Hay. 157, note, *State vs. Braden*, 2 Tenn. Rep. 68, *State vs. Wright*, 5 Yer. Rep. 155, and *Fetter vs. The State*, 9 Yerger, that to constitute larceny there must be at least a constructive possession in the owner of the goods and a trespass in the taking; and this is certainly so, upon the authority of the cases referred to. But the question before us is, had not the prosecutor, under the circumstances proved, a constructive possession, so as to make a taking, with the intention to appropriate, a trespass, and therefore a larceny? The defendant's counsel answers the question in the negative, and strenuously contends that the prosecutor, having gone away from the shop without remembering that he had left his pocket-book behind him, the same, during the time his mind remained in that state, may be said to have been lost; and that it has been determined in the case of *Porter vs. The State*, Martin and Yer. 226, that the fraudulent appropriation of lost goods, even where the finder knows the owner, is not larceny. We answer that the pocket book, under the circumstances proved, was not lost, nor could the defendant be called a finder. The pocket book was left, not

NASHVILLE,
December, 1839.

Mayor, &c.

Beasley.

lost. The loss of goods, in legal and common intendment, depends upon something more than the knowledge or ignorance, the memory or want of memory, of the owner, as to their locality at any given moment. If I place my watch or pocket-book under my pillow in a bed chamber, or upon a table or bureau, I may leave them behind me indeed, but if that be all, I cannot be said with propriety to have lost them. To lose is not to place or put any thing carefully and voluntarily in the place you intend and then forget it, it is casually and involuntarily to part from the possession; and the thing is then usually found in a place or under circumstances to prove to the finder that the owner's will was not employed in placing it there. To place a pocket book, therefore, upon a table, and to omit or forget to take it away, is not to lose it in the sense in which the authorities referred to speak of lost property; and we are of opinion, therefore, that there was no error in the charge of the court in reference to the facts in this case, and we affirm the judgment.

MAYOR AND ALDERMEN OF COLUMBIA vs. BEASLY.

The corporate authority of the town of Columbia may tax privileges; but if this power is exercised by the passage of by-laws which are oppressive and unequal, such by-laws are void.

A general allegation in defendant's plea that a by-law is unequal and oppressive is not sufficient. The defendant must set forth and show, by a specification of facts, the oppressiveness and inequality of such law.

The Mayor and Aldermen of Columbia instituted an action of debt in the circuit court of Maury county, on the 10th day of August, 1837, against Esau Beasley, to recover of him the sum of one hundred and fifty dollars, a tax imposed by the corporation of Columbia upon all persons keeping houses for the purpose of retailing spirituous liquors within the corporate limits of said town. The plaintiffs set forth their cause of action as follows: "The Mayor and Aldermen of the town of Columbia assembled, did, in pursuance of and by virtue of the act incorporating the in-

habitants of said town, make the following by-law and ordinance, to wit: "Be it ordained by the authority aforesaid, that a tax of one hundred and fifty dollars be and the same is hereby levied upon each and every confectionary or coffee house within the limits of this corporation that may be opened at this time, or that may at any time hereafter be opened during the present corporate year, for the purpose of retailing spirituous liquors by the measure, drink or otherwise, to be paid in cash, for the use and benefit of this corporation." And said ordinance further provided, in substance, that if any person who was liable to said tax should fail to pay the same, after being duly requested by the constable of the corporation or by any other person duly authorized to receive the same, that suit should be brought for the collection of the same. And the said Mayor and Aldermen further aver, that the said Esau Beasley, at the time of the passage of the ordinance aforesaid, and since the time thereof, had and now has opened in the town of Columbia and county of Maury, and within the limits of said corporation, a grocery or confectionary; for the purpose of retailing and selling spirituous liquors by the measure and drink, and has, since the passage thereof, so retailed and vended within the limits spirituous liquors by the measure and drink. And the said Mayor and Aldermen further aver that said Esau Beasley, although requested so to do by the constable of said corporation, has not paid said sum of one hundred and fifty dollars, the tax aforesaid, to said constable, upon due demand thereof, or to said Mayor and Aldermen."

NASHVILLE,
December, 1839.

Mayor, &c.
v
Beasley.

There were two other counts in the declaration substantially the same as the above.

The defendant pleaded to this declaration: 1. *Nil debet*. Upon this plea issue was taken.

2. That at the time of the assessing and levying of the said tax of one hundred and fifty dollars by the Mayor and Aldermen of Columbia, and before and since that time, he was a retailer of spirituous liquors and keeper of an ordinary in Columbia in Tennessee, authorized and licensed to retail spirituous liquors and keep an ordinary in the county of Maury by the laws of the State, and the license issued to

NASHVILLE,
December, 1839.

Mayor, &c.
v
Beasley.

said defendant by the county court for Maury county; and whilst thus engaged in his lawful occupation in the town of Columbia in the county of Maury, under the authority and license of the State of Tennessee, and his said authority and license being still in force and unexpired, the said law and ordinance of the Mayor and Aldermen of Columbia was passed, in direct contradiction to the laws of the State and in violation of and disregard of his said license so issued as aforesaid. Demurrer and joinder in demurrer.

3. That the law or ordinance passed by the Mayor and Aldermen of the town of Columbia, on the — day of —, 1837, and referred to in the declaration, is unjust, unequal and wanting in uniformity, imposing slight burdens on some classes and oppressive and ruinous ones on others, without any regard to the amount of the property owned, but raising and collecting the largest amount of the taxes for corporation purposes from a small class of citizens with but little property, and collecting but a small portion of the taxes from the great body of the citizens; thereby levying and collecting the taxes without any regard to equality, uniformity, justice or equity in the assessment. Demurrer and joinder in demurrer.

4. That notwithstanding he is authorized by the laws of the State to retail spirituous liquors, yet the said Mayor and Aldermen of Columbia, in enacting the said fifth section of the act or ordinance of the — day of —, 1837, mentioned in the declaration, imposed the said tax of one hundred and fifty dollars on the defendant as a retailer of spirituous liquors, not regarding the occupation of the defendant as a privilege secured and sanctioned by the law, but regarding the same as a nuisance and vice, and so regarding his said privilege as a nuisance and a vice, he alleges that the said Mayor and Aldermen have imposed the tax of one hundred and fifty dollars on his said privilege and occupation as such nuisance and vice, not with the view of regulating and restraining ordinances and tippling houses, but with the view and for the purpose of raising taxes on nuisances and vices. Demurrer and joinder in demurrer.

5. That the said fifth section of the act or ordinance of

the Mayor and Aldermen of the town of Columbia, referred to in the plaintiffs' declaration, was not passed by the Mayor and Aldermen of the town of Columbia to lay and collect taxes for the purpose of carrying the necessary measures into operation for the benefit of said town. Demurrer and joinder in demurrer.

NASHVILLE,
December, 1838.

Mayor, &c.
v
Beasley.

7. That the said ordinance of the Mayor and Aldermen of the town of Columbia, passed on the — day of —, 1837, was enacted without any authority from the constitution and laws of the State and in direct violation thereof. Demurrer and joinder in demurrer.

At the May term, 1838, the honorable Samuel Anderson, judge, presiding, this cause came on, and being argued, the court was of opinion that "the declaration and the matters therein contained were not sufficient in law to enable the plaintiffs to have and maintain their action against the defendant, and that he go hence," &c.

From this judgment the plaintiffs prayed and obtained an appeal in the nature of a writ of error to the supreme court.

W. A. Cook, for the plaintiff in error. 1. Corporations exist either by prescription, the king's charter or by statute. *Wilcox on Corporations*, 21: 12 Law Library, 11.

2. When the charter is created by the king or by statute it is governed by certain regulations called ordinances. These are: 1. Customs; 2. Regulations prescribed by the charter or by statute; 3. By the rules called by-laws, meaning the laws of the inhabitants of the place. 12 Law Library, 40.

3. There being no customs to operate in this cause the ordinances are the regulations in the charter and by-laws alone.

4. When the king creates the charter, inasmuch as he has the legislative power he cannot introduce in the charter any unreasonable rules or such as are contrary to the common law. 12 Law Library, 55.

5. The legislature being the law-making power can confer any powers upon the corporation. 12 Law Library, 54.

6. By-laws within the powers conferred may be enforced by penalty. 12 Law Library, 54, 296.

7. The act of 1817, ch. 143, incorporating the town of Co-

NASHVILLE,
December, 1839.

Mayor, &c.
v
Beasley.

Columbia, section 2, confers the power to regulate and restrain tippling houses, to impose and appropriate fines and penalties and forfeitures, to lay and collect taxes, and to pass all laws necessary and proper to carry into effect the powers conferred.

8. The power to restrain and tax tippling houses confers the power exercised by the Mayor and Aldermen in this case; therefore, the ordinance passed on the 19th day of April, 1837, sec. 5, is legal and valid. The power to restrain is equivalent to the power to suppress nuisances; all corporations have this power. 12 Law Library, 79, 336, 337, 338, 339.

Cahal, for defendant. 1. The sovereign power of every country has the right to amend or annul the charters of municipal corporations. 2 Kent, 274, 3d ed: *Dartmouth College vs. Woodward*, 5 Cond. Rep. 534: *Terret vs. Taylor*, 3 Cond. Rep. 284.

The charter of the corporation of Columbia was granted under the constitution of 1796. See acts 1817, ch. 144: 2 Scott's Rev. 400. The second section, among many other enumerated powers, authorizes the Mayor and Aldermen "to prevent and remove nuisances, to impose fines, penalties and forfeitures for the breach of their by-laws, to lay and collect taxes for the purpose of carrying the necessary measures into operation for the benefit of said town, to regulate and restrain tippling houses, &c." This charter is a constitution for this petty legislature, and the Mayor and Aldermen are bound to conform their acts to its provisions and pass no by-laws inconsistent with the constitution and laws of the State. Angel and Ames, 183, 188: 2 Bac. 9.

By the constitution then in force, article 1, section 26, all taxes on lands shall be uniform in such manner that no one hundred acres shall be taxed higher than another, except town lots, which shall not be taxed higher than two hundred acres of land each; no free man shall be taxed higher than one hundred acres of land, and no slave higher than two hundred acres.

The constitution of 1834 establishes a new principle of taxation, which is repugnant to that which existed in 1817.

By article 2, section 28, it is provided that "all land liable to taxation, town lots, slaves, &c., shall be taxable. All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that the same shall be equal and uniform throughout the State. But the legislature shall have power to tax merchants, pedlars and privileges in such manner as they may direct. A tax on white polls shall be laid, &c."

NASHVILLE,
December, 1839.

Mayor, &c.
v.
Beasley.

Section 29th provides that "the general assembly shall have power to authorize the several counties and incorporated towns to impose taxes for county and corporation purposes, and all property shall be taxed according to its value on the principles established for State taxation."

The 28th section of article 2d of the amended constitution is a repeal of the 27th section of article 1st of the old constitution, and all laws passed under it where they conflict. But the first section of article 11th of the new constitution says that "all laws now in force, not inconsistent with this constitution, shall continue in force." The taxing power conferred on the corporation of Columbia must have been exercised conformably to the old constitution, and that is inconsistent with the principles of the new constitution, and is thereby annulled. The convention seem to have regarded the matter in this light by expressly providing that the legislature "may authorize the several incorporated towns to impose taxes." The constitution does not say they may tax, but may be authorized to tax.

The legislature, at the session of 1835-6, authorized the counties, but omitted to empower the corporations to lay taxes. From this omission inconveniences may arise, but corporations cannot derive powers from inconveniences. There are rights which follow as incident to all corporations, but they have no implied powers. Their delegated power is to be strictly construed. 2 Kent, 277, 296, 298; Angel and Ames, 177 to 206.

The levying taxes is an exercise of sovereignty. *Marr vs. Enloe*, 1 Yerger. If the legislature had the right, under the old constitution, to delegate it, (which this case denies,) the convention unquestionably had authority to revoke the grant,

NASHVILLE,
December, 1839.

Mayor, &c.
v
Beasley.

by establishing a rule of taxation inconsistent with the constitution, which existed when the power to tax was conferred on the incorporated towns in Tennessee.

2. But if municipal corporations, without an express general law, from the 29th section of article 2d of the constitution can derive authority by implication to conform their taxing powers to the principles of the new constitution, they must, by a general and uniform ordinance, levy the taxes upon the same principles, the same property and occupations, and in the same proportion that the State collects its revenue; that is, if they tax a privilege, they must conform such tax exactly to the proportion which it bears to the revenue collected by the State from land, slaves and privileges. If they can deviate from this rule there will be no uniformity and no equality, and one species of property or one avocation may be made to bear all the burdens of the corporation expenses and others reap all the benefits. For a just system of taxation see 2 Kent, 336.

By levying the great burden of taxes on any one privilege or species of property the corporate towns can exclude any of the useful avocations by which men live. They can lay all the taxes on lots and force owners to sell at any price; or all on slaves, and establish an abolition jurisdiction in Tennessee; or all on merchants, and exclude trade; or all on polls, and give property a dangerous preponderance over rights strictly personal. If all other powers can be absorbed and exercised under pretence of taxation, what can they not do in this age when there are so many restive spirits warring against our ancient laws and blessed institutions? They can draw marriage under the ban of their taxing prohibition, and legalize general libertinism; or they may level all the force of their unlimited taxing power against private property and compel its owners to sell to the corporation. If they can tax vice for the promotion of virtue, when what is vice and what is virtue depends too often on fashion, caprice or enthusiasm, and that which is the one to-day will be the other to-morrow, there is no security for those who claim the protection of written constitutions and fixed principles.

3. By-laws must be reasonable and are void for oppression.

Angel and Ames, 184, 198: 2 Kent, 296. At the time this corporation taxed the privilege of keeping a house for the sale of liquors one hundred and fifty dollars the State taxed the same privilege twenty-five dollars, and the privilege of merchandising from twenty to one hundred and fifty dollars, graduated in proportion to the capital employed. What an enormous disproportion and outrage upon all principles of justice and equality!

NASHVILLE,
December, 1839.

Mayor, &c.
v
Beasley.

4. The corporation has no power to lay heavier taxes upon this privilege upon the ground that it is a nuisance. The power to tax and the power to restrain nuisances are distinct. A tax may be levied to remove nuisances, but the nuisance itself cannot be taxed. A tax can only be levied upon that which is lawful. 3 Wheeler's Cases, 76. The corporation may restrain tippling houses, but a licensed grocery is not a tippling house. *Dunaway vs. State*, 9 Yer. 352.

GREEN, J. delivered the opinion of the court.

This is an action of debt to recover one hundred and fifty dollars, the tax assessed by the corporation aforesaid for the year 1837, upon the defendant, as the keeper of a grocery for the retail of spirituous liquors in the town of Columbia. The ordinance laying the tax, was passed the 19th of April, 1837, and is as follows: "Be it ordained by the authority aforesaid, that a tax of one hundred and fifty dollars be and the same is hereby levied upon each and every grocery, confectionary or coffee house within the limits of this corporation that may be opened at this time, or that may at any time hereafter be opened during the present corporate year for the purpose of retailing spirituous liquors by measure, drink or otherwise, to be paid in cash for the use and benefit of this corporation."

The defendant pleaded, first, *nil debet*, to which there was an issue; secondly, that he sold liquors by virtue of an authority and license under the laws of this State. To this plea the plaintiff demurred. The third plea alleges that the tax of one hundred and fifty dollars is oppressive and unequal. To this plea there is a demurrer. The fourth plea alleges that the Mayor and Aldermen, in imposing the tax, regarded the

NASHVILLE,
December, 1838.

Mayor, &c.

v

Beasley.

privilege of selling liquor not as a lawful trade but as a vice. To this plea there was a demurrer. The fifth plea alleges that the tax was imposed with a view to prohibit the defendant from pursuing a lawful occupation, and not for the purpose of raising a revenue. To this plea there is a demurrer. The sixth plea alleges that the tax was not laid to carry any necessary measure into operation; and the seventh plea says the corporation had no power to pass the ordinance; to each of which there are demurrers. The court gave judgment upon the demurrer for the defendant on the ground that the declaration does not set out a good cause of action. From this judgment the plaintiff appealed to this court.

The charter of the corporation of Columbia, October, 1817, ch. 143, sec. 2, expressly confers the power on the corporation to lay and collect taxes. The constitution, article 2, section 28, empowers the legislature to tax privileges in such manner as they from time to time may direct. By the act of 1835, ch. 13, sec. 4, retailing spirituous liquors is made a "privilege," and taxed as such.

There is no question then but that the corporation had the right to tax tippling houses to some extent. The power to lay this tax, if it exist at all, must be drawn from the direct taxing power conferred in the charter. It cannot be derived from the power to regulate and restrain tippling houses. That must be done by such ordinances as will prevent these houses from becoming disorderly, and imposing penalties for the infraction of such laws. The taxing power could only have been exercised in reference to this trade as a lawful occupation, affording to the persons who follow it a profit which would make it proper they should pay a tax for the privilege. By the 28th section of the 2d article of the constitution it is provided that all property shall be taxed according to its value, and that no one species of property from which a tax may be collected shall be taxed higher than any other species of property of equal value; but the legislature may tax privileges as they may from time to time direct. The 29th section of the same article provides that counties and corporations "shall tax property according to its value, upon the principles established in regard to State taxation." Nothing

is said in this section in regard to privileges, and therefore they are left, in regard to them, to the exercise of a sound discretion. It would be safe to conform the exercise of this power to the principles established in regard to State taxation, and to tax privileges in the proportion they pay to the State. But a want of exact conformity in this respect would not make the tax void, for the legislature may tax privileges in what proportion they choose, and so may corporations, provided the inequality be not such as to make it oppressive on a particular class of the community. A by-law for oppression is void. Angel and Ames, 184.

NASHVILLE,
December, 1839.

Mayor, &c.
v
Beasley.

If, in this case, it were shown by the pleadings what amount of revenue was needed in Columbia for carrying necessary measures into operation for the benefit of the town, and what tax was paid for property, and what for other privileges, and thus it were made to appear that the taxes were so unequal as to make this an oppressive tax, we should have no difficulty in declaring the ordinance by which it is levied void. But this is not the case, and we cannot act upon what we may suppose the fact to be. For ought we know, expensive improvements are in progress, and other privileges are also paying high taxes. The general statement, in the third plea, that the tax is oppressive and unequal, is not an allegation of facts from which the court can say it is oppressive and void. The other pleas, to which there are demurrers, are manifestly bad.

We think, therefore, that the declaration contains the statement of a good cause of action, and that no one of the pleas to which the plaintiff demurred constitutes a good defence to it, and therefore the court erred in giving judgment for the defendant.

Reverse the judgment and remand the cause to be proceeded in.

NASHVILLE,
December, 1839.

Stewart
v

Insurance Co.

STEWART VS. TENNESSEE MARINE AND FIRE INSURANCE CO.

To lash a flat-boat, descending the Mississippi, laden with produce, to a steam-boat to be towed, is a departure from and a violation of the contract of insurance.

But if, after a peril insured against has been encountered by the flat-boat, as, for example, collision with a steam-boat, the master, believing the danger of immediate loss to be imminent, cause his boat to be lashed to a steam-boat to be towed to the nearest landing, though this enhance the danger and contribute to a loss, yet if honestly intended by the master, the underwriters will not be thereby discharged. For, in such circumstances, the master is the agent of all concerned, underwriters as well as owners, and his errors of judgment will not discharge the former.

Otherwise, if, after the injury, the boat is able to sail and does sail to a landing, and repairs are there omitted by the master, because he believes them unnecessary, or repairs being impracticable, he omit to tranship the cargo, which is lost by reason of the injury to the boat. For, in such, case the master is agent of the owners, who must bear losses arising from his negligence, unskillfulness or errors of judgment.

It is not barratry in the master to omit to make practicable repairs, or to tranship the cargo, or to deviate, unless, in so acting or omitting to act, his purpose was to injure the owners.

John Stewart, Boyce Stewart and Daniel Stewart, partners in trade, instituted this action of covenant, on a policy of insurance, in the circuit court of Davidson county, against the Tennessee Marine and Fire Insurance Company, to recover damages for the loss of seventy-six hogsheads of tobacco insured from Smith county, Tennessee, to New Orleans, and which was shipped on board the flat-boat, Black Hawk, and sunk in the Mississippi river.

There were various issues of fact and of law made, and the issues of law having been determined in favor of the defendant, the plaintiffs appealed in error.

The state of pleadings upon which the cause was determined is so fully set forth in the opinion of the court as to render any further statement unnecessary.

Washington and Meigs, for the plaintiffs.

Fogg and Campbell, for the defendant.

REESE, J. delivered the opinion of the court.

NASHVILLE,
December, 1839.

Stewart
v
Insurance Co.

This is an action of covenant upon a policy of insurance upon one hundred and one hogsheds of tobacco, shipped on a flat-boat from Smith county, Tennessee, to New Orleans, to recover for seventy-six hogsheds alleged to have been lost by one of the perils insured against.

The declaration contains two counts. The first count states that the flat-boat while pursuing her voyage on the Mississippi river encountered a steam-boat called the Revenue, and was materially damaged and injured, which caused her to leak so badly that she had to run ashore, where she sunk, and seventy-six hogsheds of tobacco were wholly lost.

The second count, in addition to the injury done to the flat-boat, states that the collision with the Revenue injured the master of the flat-boat and two of the hands so much that they, with the hands left, were unable to carry the boat to New Orleans without towing; and avers that the master examined with care the nature of the injury sustained by the boat, and believed that it could be safely towed to New Orleans, and being unable to procure hands to navigate her, hired the steam-boat Mississippi to tow her down to New Orleans; but before she had, so being towed, proceeded very far, she was found to be sinking in consequence of the injury received from the Revenue, was run ashore, and seventy-six, part of the one hundred and one hogsheds of tobacco, were wholly lost.

A number of pleas were filed, a portion of which only we deem it necessary to notice.

The third plea alleges that after the collision with the Revenue the plaintiffs could have procured, but did not procure, another master and crew, and the boat could have been repaired and rendered sea worthy, but was not; and the cargo could have been safely delivered at New Orleans, but was not, on account of the fault of the plaintiffs and their agents.

The plaintiffs, for replication to this plea, allege that after the accident of collision, a competent master and crew could not have been procured to conduct the boat to New Orleans; and, as to repairing her, they aver the reason why, after sus-

NASHVILLE,
December, 1839.

Stewart
v
Insurance Co.

taining the injury, she was not repaired, was that the master, after careful examination, in good faith believed that no repairs were necessary except stopping the breaks and holes produced by the concussion, which was properly done.

To this replication the defendant filed a demurrer.

The fifth plea alleges that after the concussion with the Revenue, the master of the flat-boat, improperly and contrary to the usual mode of navigating flat-boats, caused the flat-boat to be lashed to the steam-boat Mississippi to be towed, and thereby changed the perils against which the defendant had insured, after all which the cargo sustained the damage complained of.

The replication to this plea is, that the produce did not sustain the damage complained of after and in consequence of the boat having been lashed to the Mississippi. To this replication there is a demurrer.

The tenth plea, drawn out in much detail, states that after the concussion the master omitted and refused to land and repair the boat, but sailed on to Vicksburg; that on his arrival at Vicksburg he omitted to secure the cargo, then but little injured, omitted to repair the boat, which ought to have been done, and to proceed on his voyage in the usual mode, but transshipping twenty-five hogsheads on board the Mississippi steam-boat, caused the boat, in a leaky condition, to be lashed to and to be towed by said steam-boat, and when compelled to run the boat ashore good care and proper pains as to the preservation of the cargo were not taken by the plaintiffs' agents, the master and crew; and so the defendant avers that the cargo was lost from the carelessness, unskilfulness and mismanagement of the master and crew.

For replication to this plea, the plaintiffs alleged that after the concussion the master did diligently examine the injury which the flat-boat had sustained, and in good faith thought that the injury was not so great as to require repairing, and he accordingly proceeded with said boat to Vicksburg; and when arrived at Vicksburg the said master again examined said boat, took off twenty-five hogsheads of tobacco, and in good faith believed that said boat could be towed to New Orleans, and did accordingly lash her to the steam-boat; and that

afterwards, to prevent her from sinking from the injury received in the concussion, she was run ashore, and the tobacco lost from the concussion aforesaid, and not from carelessness, negligence, &c. of the master and crew.

NASHVILLE,
December, 1839.

Stewart
v
Insurance Co.

To this replication the defendant filed a rejoinder, to which the plaintiffs demurred.

The thirteenth plea alleges that the shock and concussion produced by the Revenue with the flat-boat did not so injure the latter and the master and hands thereof as that they, with the rest of the hands left, were unable to carry the boat to New Orleans without towing.

For replication to this plea, the plaintiffs state that the loss sustained by the tobacco in the declaration complained of was caused by the shock and concussion produced by said flat-boat and said steam-boat meeting, whereby said flat-boat sprung a leak, and was for that cause necessarily run ashore. To this replication the defendant demurred.

All these demurrers were sustained in the circuit courts, and judgment given for the defendant that it should go thence without day, &c. To reverse which judgment, the plaintiffs have prosecuted a writ of error to this court.

From the facts and allegations in the above recited pleadings three general questions arise for our consideration. 1. After the occurrence of a peril insured against, not of a character to produce immediate loss, what effect upon the rights of the parties is produced by the mistakes, the want of skill, care and attention of the master and crew in omitting to repair the boat, to procure another, or to secure the cargo by re-shipment or otherwise? 2. Was the lashing the flat-boat, with so large a portion of the cargo on board, to the steam-boat Mississippi, to be towed from Vicksburg to New Orleans, an act changing the risk, and under the circumstances, amounting to a deviation? 3. What effect upon the state of the question, in view of the true grounds above stated, has the fact that in the policy before us there is an insurance against barratry?

1. In the question first stated is involved the inquiry whether the master and crew are the agents of the owner, or of

NASHVILLE,
December, 1839.

Stewart
v
Insurance Co.

the underwriters, or of both? Upon this point it is stated in *Goix vs. Low*, 1 John. Cases, 345, by Mr. Justice Kent, that "the insurers are not liable for the losses arising from the mistakes of the owner or master." It is elsewhere stated as a principle that the assured is in general not entitled to indemnity for the faults and negligence of the master and crew, and the question between him and the underwriters in this respect is the same that it would be between two sets of underwriters, of whom one should insure against the usual perils and the other against the mistakes, negligence and unskilfulness of the master and crew, the assured being considered in all cases to be his own underwriter in respect to all risks not insured against in the policy. 1 Philips on Insurance, 226.

It is admitted by the counsel for the plaintiffs that in general the master and crew are agents of the assured and not of the insurers. But they contend that after the property has encountered one of the perils insured against, the master and crew become the agents of the underwriters, or rather of all parties interested.

It is true that when such peril has been encountered and the property insured is in imminent danger of immediate loss, the master does act for all concerned, and may be said to be the agent of the underwriters as well as of the owners, and the steps which he takes, under the guidance of his best judgment, during the continuance of this extraordinary state of things, for the preservation of the cargo and vessel, though ill-judged and erroneous, as it is for the benefit of all, the underwriters will not be permitted to make it the ground of their discharge.

If, for example, in the present case, the immediate danger to the flat-boat and cargo from the concussion with the steam-boat Revenue had been greater than it was, and with a view to prevent the loss of the boat and cargo it had been lashed to the Revenue for the purpose of being towed to the nearest landing, although such lashing and towing might have enhanced the danger or even contributed to the loss, such act of the master, honestly intended under such circumstan-

ces for the benefit of all, would not exonerate the insurers from liability. But in case of the slight danger which actually existed, unattended with any extraordinary risk, and when the boat, although injured, was able to sail and did sail to the port of Vicksburg, it was the duty of the master, as the agent of the owners, to have caused, at least at Vicksburg, proper repairs to have been made to his boat, and if that could not have been done to have re-shipped the cargo on some other boat.

NASHVILLE,
December, 1839.
Stewart
v
Insurance Co.

In the case of *Schieffelin vs. The New York Insurance Company*, Kent J. says: "if the captain has other means to forward the cargo and save the voyage and earn the freight, he ought to do it. What may be done ought to be done when the rights of third persons are essentially concerned in the act. He is the agent of the insured until an actual and valid abandonment, and they ought to bear the consequences of his neglect if the voyage be thereby lost, unless barratry be the cause of that neglect." And he refers to a case tried before Lord Ellenborough, (2 Camp. N. P. 623,) where the insurance was upon a cargo of wheat from London to Lisbon, and the ship was disabled after the voyage had begun, and could not be repaired except at a cost greater than her entire value; but it appearing that there was another vessel lying at Dover, where the injured ship lay, in which the cargo might have been forwarded, his lordship held that the plaintiff could not recover.

Again, in the same case, Kent, J. lays it down as a general rule that the "plaintiff must make it appear that the voyage was lost by a peril within the policy;" and he adds "it is not lost as to the ship if the master has the means to repair her, nor as to the cargo and freight, if he has the means to send on the one and to earn the other." So also in the case of *Paddock vs. Franklin Insurance Company*, 11 Pick. 227, Shaw, J. says, "there can be no doubt that after the vessel has met with such accidents, disasters and losses as to weaken and disable her and render her incapable of proceeding with reasonable safety, it is the duty of the owner to procure the necessary repairs as soon and as effectually

NASHVILLE,
December, 1839.

Stewart
v
Insurance Co.

as he can reasonably do so under the circumstances in which the ship is placed. If in a remote sea, or on a desolate or savage island, a temporary expedient, however inadequate to the wants of the ship, must be sufficient, being the best which can be resorted to. But if the vessel, in such a condition, make a port where repairs can be obtained, and leaves such port without obtaining them, it is a fault and an instance of negligence on the part of the owner, who will have no claim upon his underwriters for losses which may be attributable to the insufficiency of the ship, and cannot be clearly traced to some independent and wholly distinct cause.

Upon this branch of the case we have been referred to the case of *Waters vs. The Merchants Louisville Insurance Company*, 11 Peters' Rep. 220, and to cases in England according therewith.

These cases discuss a much disputed question, namely, where fire or other peril insured against is the proximate and immediate cause of the destruction of the property insured, whether it can be held to discharge the underwriters, if they show that more care and vigilance on the part of the owner or his agents might have prevented the incidence of the peril, or even that negligence or mismanagement on their part brought on the peril. These authorities hold that the underwriters are not, upon such grounds, to be discharged. It is not material in the present case that we should inquire on which side of this conflict we may suppose the greater weight of reason and authority is to be found. There seems to be much force in the view of Mr. Justice Story as to the question in dispute.

But that is not the question before us. The question here is not as to the negligence of the owner or his agents before or at the incidence of the peril, but we have a case where the peril did not destroy but merely injured and endangered the vessel containing the cargo insured, and where the injury suffered was in its nature and under the circumstances repairable, but not in fact repaired, from the mistake, inattention or ignorance of the agent or owner. This forms a distinct and totally different case, and there is nothing to be

found in the cases referred to in conflict with the views which we have expressed or the authorities which we have cited and relied on.

NASHVILLE,
December, 1839.
Stewart
v
Insurance Co.

The vessel might have been repaired at Vicksburg but was not, because the master deemed the injury so slight as not to make it necessary. The cargo, it is probable, might, the whole of it, have been shipped on board the Mississippi, as a part in fact was, but the master thought it not necessary; for the consequences of his ignorance, mistakes and negligence in these respects, the owners, his principals, must suffer, and not the underwriters.

2. We are to enquire whether the lashing of the flat-boat, with so large a portion of the cargo on board, to the steam-boat Mississippi to be towed from Vicksburg, was an act changing the risk, and under the circumstances, amounting to a deviation? It is averred in the pleas that the towing of flat-boats by steam-boats is not according to the usual course and mode of navigation. And it is admitted in argument that if the boat, before the injury received, had been then towed, the risk would have been not only changed but enhanced, and the underwriters would have been discharged; and it would seem that, in the natural situation of the boat after the injury, the risk from such changed mode of navigating her would have been still greater.

We have already said that if after the occurrence of the accident it had been deemed necessary to tow her to the first convenient landing or port, for the purpose of reparation or re-shipment, it would have been very proper and would not have amounted to a deviation. But, for the purpose of prosecuting so large a portion of the voyage as that intervening between Vicksburg and New Orleans, to lash a flat-boat to a steam-boat is certainly a deviation, and the rather, after the injury produced by the peril referred to.

We have no doubt that in point of fact the risk was by these means increased, but it is not necessary that it should be shown to have been so; it is sufficient if it were changed. The supreme court of the United States, in the case of *Maryland Insurance Co. vs. Levy and others*, upon this subject

NASHVILLE,
December, 1838.

Stewart
v
Insurance Co.

says: "that the discharge of the underwriters from their liability in such cases depends not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance. The consequences of such violation of the contract are immaterial to its legal effect, as it is, *per se*, a discharge of the underwriters, and the law attaches no importance to the degree in cases of voluntary deviation. Necessity alone can sanction a deviation in any case, and that deviation must be strictly commensurate with the *vis major* producing it." 7 Cranch's Rep. 30.

3. As the policy in this case contains a clause of insurance against barratry, what effect has that upon the question of the liability of the owners for the negligence of the master in not repairing the boat, in not re-shipping the cargo, or in being guilty of a deviation in lashing the boat with her cargo to the steam-boat to be towed?

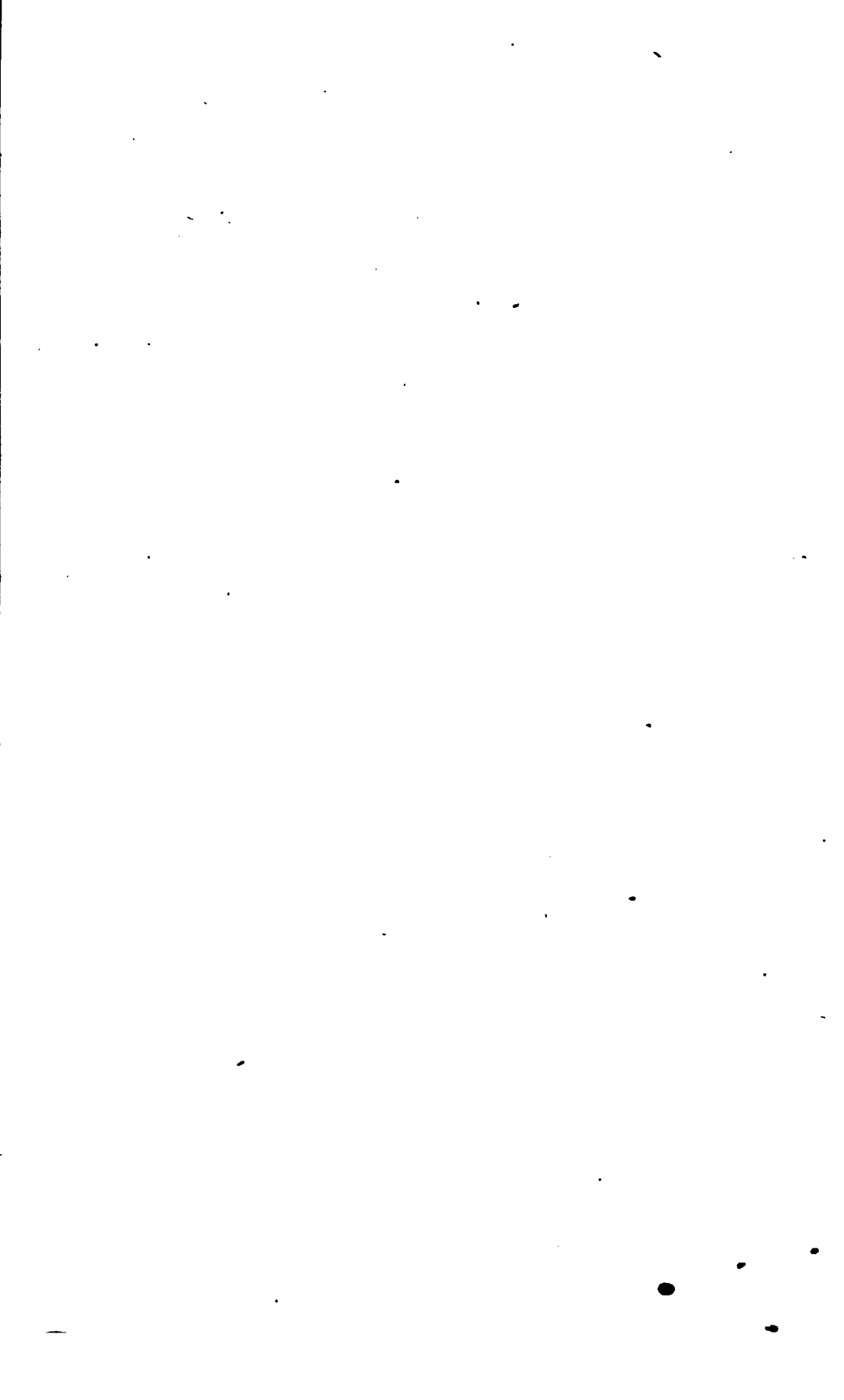
As to the true meaning of the word barratry there seems to be much dispute between the continental writers and those of England and America. In the latter countries, however, it is held to mean the wrongful, injurious and fraudulent conduct of the master and crew (*maleficium*) towards the owner, as relates to the vessel and cargo. The word *dolus* expresses the meaning attached to the word in England and America better than the word *culpa*. Cases have existed where the negligence has been so gross on the part of the master as to be deemed and taken as proceeding from a wrongful and injurious intention towards the owner and his interests; and it may be sometimes difficult in practice to determine where negligence not insured against terminates and where barratry commences.

We are of opinion that the facts of this case raise no such difficulty; and even if of themselves they would have done so, all such difficulty is removed by the allegations of the plaintiffs in their declaration and replications, that the acts of their master in omitting to repair the boat, to re-ship the cargo, and the act of lashing to and towing, were done honestly by him and in good faith. The underwriters, therefore, are not, on the ground of the clause against barratry in this policy, to be made liable.

We have deemed it proper to determine this case upon the general grounds above discussed, and have not thought it necessary to examine minutely the questions of special pleading argued at the bar, because we are satisfied that an examination of those questions would not change the result to which we have arrived, but would strengthen the grounds upon which we have seen fit to place the case. The judgment of the circuit court is therefore affirmed.

NASHVILLE,
December, 1839.

Stewart
v
Insurance Co.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE.

JACKSON: APRIL TERM, 1839.

WARD vs. THE STATE.

It is too late to challenge any of the members of a jury in a criminal case *propter defectum* after they have been sworn to try the cause.

JACKSON,
April, 1839.

Where the court permitted the attorney general to challenge jurymen *propter defectum* after they were sworn and charged, and the prisoner put upon his deliverance, and they were set aside against the consent of the prisoner, and other jurymen substituted in their places, who convicted the prisoner: Held, that the prisoner was discharged.

Ward
v
The State.

At the November term of the circuit court of McNairy county, in the year 1834, a bill was presented by Roger Barton, the attorney general of the fifteenth solicitorial district, to the grand jury, against Ferguson Ward, for the murder of Moore G. Wisdom, on the 30th day of August, 1834, in the aforesaid county, by stabbing. The grand jury returned this bill into open court endorsed a true bill. The defendant pleaded not guilty, and issue was joined thereupon. After several continuances it was tried at the June term, 1836, and a verdict returned that the prisoner was "guilty of murder in the first degree, in manner and form as charged in the bill of indictment." A motion was made to set aside this verdict, and argument having been heard thereupon, the honorable John Read, presiding, by interchange with the honorable A. Miller, set aside the verdict and awarded a new trial to the defendant. The cause was subsequently continued

JACKSON,
April, 1839.

Ward
v
The State.

from time to time till the February term, 1838. At this term, an attempt being made to select a jury and such attempt proving unsuccessful, his honor Benjamin C. Totten, being of the opinion that a fair and impartial trial could not be had in the county of M'Nairy, with the assent of the prisoner, changed the venue to the county of Hardeman.

At the July term, 1838, the cause came on for trial. The defendant, in the progress of the cause, filed his bill of exceptions in the following words, to wit:

"Be it remembered, that heretofore, to wit, on the 20th July, 1838, Ferguson Ward was put upon his trial before the honorable John Reid, judge, &c. on a change of venue from the circuit court of M'Nairy county, on an indictment for the murder of Moore G. Wisdom, and after having been placed upon his trial he proceeded to elect and empanel a jury, and thereupon the following twelve men, to wit, Jacob Lowry, &c. &c., all freeholders, householders or occupant holders, and citizens of the county of Hardeman, were elected and empanelled to serve as jurors in said cause; and also having been selected and empanelled, were thereupon sworn upon the Holy Evangelists of Almighty God well and truly to try the issue joined and true deliverance make between the State of Tennessee and the said Ferguson Ward, defendant, and a true verdict to render according to evidence; and having been empanelled and sworn, as aforesaid, the said jury took their seats; whereupon the solicitor general on behalf of the State read to them the bill of indictment against said Ward, which having been done the witnesses on behalf of the State were called up and severally sworn and ordered by the court to be placed under the rule; at which period in the cause the counsel for the State suggested to the court that in cases where the venue was changed it was necessary and required by law that the jury should be composed of freeholders, and that in this case the question which had been asked of the jurors was, whether they were freeholders or householders of the county of Hardeman, and that having answered in the affirmative, it was still doubtful whether or not they were all freeholders; he therefore moved the court that the jury be again called sev-

JACKSON,
April, 1839.

Ward
v
The State.

erally, and asked the question "if they were freeholders in the county of Hardeman," and that those who answered in the affirmative should still remain as jurors in the case, and that those who should answer "no," should be withdrawn and set aside and others who were freeholders elected in their places; to which motion on the part of the State the defendant, by his counsel, objected, which objection was overruled, the defendant by his counsel thereto excepting, and the jury ordered to be again severally called and asked the question "if they were freeholders of the county of Hardeman;" whereupon, the question being asked, R. D. Casey and A. Poor answered and stated that they were freeholders of the county of Hardeman, and five of them, to wit, Jacob Lowry, &c. &c. answered and stated that they were not freeholders in the county of Hardeman, but they were the owners of occupant claims in said county, and the balance answered and stated that they were not freeholders but householders in the county, whereupon the court ordered Casey and Pool to be and remain as jurors in the case; to which order of the court, retaining said Casey and Pool, nothing was said on either side, and the balance of the jurors so selected were ordered to be withdrawn from the jury, and ten freeholders to be selected in their stead; to all of which orders of the court the defendant, by his counsel, excepted, and demanded a trial by the jury aforesaid, elected, empanelled and sworn as aforesaid.

The defendant, by his counsel, then moved the court that those jurors who had answered that they were occupant holders should be allowed to remain upon the panel as jurors by him elected. This motion the court overruled; to which opinion of the court in overruling the motion the defendant, by his counsel, excepted; whereupon the aforesaid householders and occupant holders, to wit, &c. &c. were, by order of the court, withdrawn from the jury aforesaid, and by the court prohibited from acting as jurors in the said cause. The sheriff was then ordered by the court to return another panel composed of the freeholders, out of whom the defendant was ordered to elect and empanel ten other jurors to serve in the room and stead of those so by the court withdrawn and set aside as aforesaid.

JACKSON,
April, 1839.

Ward
v
The State.

To all of which actings and doings on the part of the court the defendant, by his counsel, objected and excepted at the time they severally occurred.

The sheriff then returned another panel, on which were Robert Rankin and others, who being severally asked if they were freeholders, answered and stated that they were not but were occupant holders, whereupon the court ordered them to stand aside; to which order of the court the defendant excepted, and claimed the benefit of said jurors as part of the panel presented by the sheriff, which the court would not allow, but ordered them to stand aside without being put to said defendant as part of the panel, he being deprived of the right of selecting a jury from amongst them as part of the panel aforesaid. To all of which actings and doings the defendant excepted at the time they severally occurred. The above facts exhibit the only ground the court had for setting aside the jury aforesaid elected, empannelled and sworn as aforesaid in said cause. Whereupon under the order of the court aforesaid the defendant proceeded to select William Sanders and six others, freeholders, from the panel returned by the sheriff; and thereupon Charles Murphy was presented to the defendant as one of the panel, and the defendant having been informed that the number of peremptory challenges allowed him was out, and there existing no objection to the said Charles Murphy for which he could be challenged for cause, the said Murphy was ordered by the court to take his seat as a juror in the cause, and thereupon the following men, to wit, &c. &c. all freeholders, were declared to be elected and empannelled as jurors to try the issue of traverse joined between the State of Tennessee plaintiff and Ferguson Ward defendant; and thereupon they were each and severally sworn to try the issue, &c. and a true verdict to render according to the evidence, and ordered to take their seats in the box, to being tried by whom the defendant, by his counsel, objected, and the objection was overruled.

To all of which actings and doings the defendant excepted and entered this his bill of exceptions to all and singular the matters and things therein contained, and prays that it may

be signed, sealed and made a part of the record, which is done.

JOHN REAB, Judge;" &c. &c.

JACKSON,
April, 1839.

Ward
v
The State:

The trial of the cause proceeded, and on the 23d of July, at the said term, the jury, under the charge of the court, returned their verdict that the defendant was not guilty of murder in the first degree, but was guilty of murder in the second degree, in manner and form as charged in the bill of indictment, and fixed the term of his imprisonment in the jail and penitentiary house at ten years. A motion was made by defendant's counsel to set aside the verdict, which was overruled. A motion was also made to arrest the judgment and discharge the prisoner, which was also overruled and judgment rendered against the prisoner in conformity with the verdict.

The defendant prayed and obtained an appeal in the nature of a writ of error to the supreme court.

Haskell, for the plaintiff in error. 1: The first selected jury was a good jury and was set aside without any legal necessity. By the statute of 1809, ch. 119, sec. 2, it was enacted that all free persons of the age of twenty-one, being householders, are competent jurors in all cases whatsoever except upon change of venue. In 1827 (ch. 30) an act was passed containing two sections; the first repealed all former laws upon the change of venue; which by itself clearly repealed the freehold qualification which existed in regard to jurors in such cases, and left the last act of 1809, ch. 119, sec. 2, to furnish the rule in the selection of jurymen. The second section of said act of 1827, under which this case was sent to Hardeman, provides, that upon the trial of criminal causes, if the judge presiding, after an attempt to select a jury, thinks a fair and impartial trial cannot be there had; he may order a change of venue to some adjoining county, &c. if the prisoner assent thereto, &c. This section does not nor does any statute require any special qualification for jurymen in such a case; and it must be a strained, illegitimate and forced construction of these acts to require any such qualification. Hence, it is contended that all of the jury first selected were good and lawful men to try the prisoner, and

JACKSON,
April, 1839.

Ward
v
The State.

ought not to have been set aside; but being sworn and then discharged, the prisoner stood acquitted, and all other proceedings against him were void. It is also contended that by the third section of the schedule to the constitution of our State occupant holders south and west of the Congressional line are made legal jurors in all cases.

2. If any of the jurors taken were not qualified jurymen it was but cause of challenge *propter defectum*, and could have been made by the State or the prisoner, and must have been made before the jurors were sworn. 2 Com. Digest, 322, title Challenge Peremptory, letter C: 1 Chitty's Crim. Law, 440, 441, 541: 4 Dallas' Rep. 353, *Holtzworth vs. Duane*: 2 Bay. 150: 7 Cranch, 290: 3 Bac. 750: Coke Litt. b, 155. The cases last cited show that the jurors taken were wholly disqualified to serve if objected to, some aliens, some infants, &c., who are no where allowed to serve on juries if challenged; and these cases and others clearly establish the rule that if such qualified jurors are taken and not objected to, or challenged before being sworn, they cannot be set aside except for matter subsequent to such swearing, and their verdicts, both in criminal and civil cases, are as binding and as valid as if they had possessed the proper, full, and in all respects, requisite qualifications. 8 Yerger, 506, *Gillespie vs. The State*: 1 Yerger, 219, *M'Clure vs. The State*: 1 Inst. 158: 3 Vin. Ab. 11, 764: 2 Hawkins' P. C. 43: Yelverton's Rep. 24, *The King vs. Watson*. These cases clearly show that if the unqualified jurors are not challenged before they are sworn, they are, by such swearing, made competent to try the issue, and that it makes no difference whether such want of qualification was known or unknown at the time the jurors were sworn; in either case the verdict must stand and judgment follow it.

3. This brings me to my last proposition, that the swearing of the jury in the first instance put the prisoner in jeopardy of life, from which I contend he was relieved by discharging that jury, and that he could not again be put in jeopardy for the same offence. 10 Yerger, *Mahala vs. The State*: 18 Johnson, 187: Martin and Yerger, 299: 2 Johnson's Cases, 305: Con. art. 1, sec. 10.

Attorney General, for the State, furnished no brief of which reporter could avail himself.

JACKSON,
April, 1839.

M. Brown, for plaintiff in error, in reply.

Ward
v
The State

TURLEY, J. delivered the opinion of the court.

We do not consider it necessary to enter into a minute investigation of the several propositions presented for consideration in this case, because we are unable to distinguish it in principle from the case of *Mahala vs. The State*, reported in 10 Yerger, where the question of the power of the courts to discharge a jury in criminal cases has been fully investigated. It is true, in that case the jury was discharged by the court after the testimony had been heard because they said they would not agree upon a verdict, and in the present it was discharged after the bill of indictment had been read because the court thought it was not composed of men who were *omni exceptioni majores*; but still we think that the same rules of law which prohibited it in the first case also prohibits it in the last. We deem it unnecessary to enquire whether the jurors who composed the jury in the present case were good and lawful men under our statutory provisions or not, because, if there were objections to them they were of that kind which are to be classed under the cause of challenge *propter defectum*, and it is well settled, both by the authorities of the courts of Great Britain and of the State of Tennessee, that it is too late after a jury has been sworn to challenge any of its members *propter defectum*, to be now a debateable point. But in the present case the court permitted the attorney general, not only after the jury had been sworn but after the prisoner had been put upon his deliverance, to challenge ten of the jurors *propter defectum*, and set them aside against the prisoner's consent, and compelled him to select ten others, who, in conjunction with the remaining two, returned the verdict upon which the judgment sought to be reversed was pronounced. That this was an illegal act cannot be controverted; it was error, and such error as cannot be corrected by reversing and remanding the cause for further proceedings, because it will be impossible ever to

JACKSON,
April, 1839.

Ward
v
The State.

place the prisoner in the same position he occupied when his jury was thus illegally broken up. The only remedy is to discharge him. It is argued for the State that a court may discharge a jury when it is for the benefit of the prisoner that it should be done or is matter of indifference to him. There is no case to be found where a jury has been discharged in either of the specified cases without the consent of the prisoner. In the case of the Kinlocks, reported in Foster, the jury was discharged by the court, with the consent of the prisoners, to enable them to make a defence which they otherwise could not have done; and it afterwards became matter of very great debate whether this was not an illegal proceeding, and after elaborate argument the court decided that it was not because the prisoners had consented thereto. It is also argued that all the authorities are that a jury cannot be discharged after they have been sworn and charged, which, it is contended, means after they have been sworn and the testimony or a part of it been heard by them. By the word "charged" we think is meant after the prisoner has been placed in the hands of the jury for trial; this by the practice in England was always formally done immediately after the jury were sworn, and before the bill of indictment was read and any of the testimony heard; it means, therefore, charged with the fate of the prisoner and not with the testimony or law of the case as is argued. In this case then a jury selected by the prisoner has been discharged by the court contrary to law, after they were sworn and charged, and against his consent, and he has been forced to trial before a jury not of his choice, who have convicted him of the offence with which he stands charged. To sustain the judgment under such circumstances would be to endanger the right of trial by jury and to violate principles well settled by authority in Europe and the United States. This we cannot do. The judgment of the circuit court must therefore be reversed and the prisoner discharged.

BROWN vs. JOHNSON.

JACKSON,
April, 1839.Brown
v
Johnson.Exhibit 71
1839
110 49

Johnson held adverse possession of land for seven years by virtue of a title bond: Held, that the second section of the act of 1819, ch. 28, barred the suit of all persons to the extent of the boundaries defined in his title bond.

Jesse Brown instituted an action of ejectment in the circuit court of Henderson county on the 10th day of November, 1835, against Terresha Johnson for the recovery of the possession of two hundred and seventy-four acres of land lying in the county of Henderson, in the ninth surveyor's district, in the fifth range and tenth section, on the waters of Sandy river. The cause was tried at the July term, 1837, and a verdict rendered for the defendant. This verdict, on the motion of the plaintiff, was set aside and a new trial awarded. At the March term, 1838, it was again submitted to a jury, judge Harris presiding. Brown introduced and read to the jury a grant duly registered for the land in controversy to himself from the State of Tennessee, dated the 21st December, 1826, and founded upon a warrant for military services performed for the State of North Carolina. Brown then proved that T. Johnson was in possession of the premises on the 10th November, 1835. The defendant then offered as evidence a bond in the following words, which covered the land in Brown's grant, to wit:

"Know all men by these presents, that I, Jesse Taylor, of Madison county and State of Tennessee, have this day sold unto Terresha Johnson, of Henderson county and State aforesaid, a certain tract or parcel of land lying in the ninth district, fifth range, tenth section, entry No. 1149, grant No. 290, containing two hundred and seventy-four acres, founded on warrant No. 5249, joining entry No. 373, in the name of Solomon Rossell, which I bind myself, my heirs, executors and administrators to make him, the said Terresha Johnson, a valid deed for whenever the said Johnson shall pay me the sum of six hundred and eighty-five dollars. In testimony whereof I have hereunto set my hand and seal this the 15th day of February, 1828. JESSE TAYLOR, [Seal.]

Test: ALEXANDER T. JOHNSON,
STEPHEN SNELL."

JACKSON,
April, 1839.

Brown
v
Johnson.

This title bond was proved by the subscribing witnesses, and was thereupon read to the jury. It appeared also that Johnson took possession of the premises in the latter part of the summer of 1828, and before the 20th day of November, 1828, he had cleared and enclosed some four or five acres; that he had continued to reside there from the time he took possession till the trial, holding the land as his own by said title bond, and that he had paid the purchase money in three annual instalments. A deed made by Jesse Taylor to the defendant for the land in controversy on the 27th day of February, 1833, and proven and registered in May, 1835, was also read to the jury.

Judge Harris charged the jury that if the defendant took possession of the land in controversy under the title bond, and had continued his possession under said bond and the deed made in pursuance thereof for the full term of seven years adverse to the title of Brown next preceding the commencement of this action, that such possession barred Brown's right of recovery to the extent of the possession which the defendant had held during the term aforesaid. The court further charged the jury that if the defendant, Johnson, had taken possession of the premises in controversy by virtue of the title bond exhibited in proof, and had continued his possession under it, and the deed made in pursuance thereof, for the term of seven years next preceding the commencement of his action, hostile to the title of Brown, that such adverse possession was to the full extent of the bounds of the land mentioned in the bond and in the deed, and barred the plaintiff's right of recovery to any part thereof. The jury rendered a verdict for the defendant, and a motion for a new trial being overruled and judgment rendered, Brown appealed in error.

M'Clanahan, for plaintiff in error.

Haskell, for the defendant in error.

GREEN, J. delivered the opinion of the court,

This case presents the question whether a defendant who is sued in ejectment is protected in any case by the second

section of the statute of limitations of 1819 beyond his actual enclosure.

JACKSON,
April, 1839.

Brown
v
Johnson.

It is contended with great earnestness by the counsel for the plaintiff in error that, by the second section of the act, there is no difference between the extent of protection afforded a party who has no claim to the land, but is a naked trespasser, and that which one enjoys who holds the possession claiming it by virtue of the highest muniment of title known to the law short of that "purporting to convey an estate in fee simple;" and that a possession of land taken and held under and by virtue of a title bond defining the boundaries of the tract cannot be construed to extend beyond the actual enclosure of the possessor. We cannot concur in this construction of the statute. By the first section it is provided that where a party shall have had possession of land more than seven years by virtue of an assurance purporting to convey an estate in fee simple, and no suit shall have been effectually prosecuted for the same within said time, the person so holding possession shall be entitled to keep possession of such quantity of land as shall be specified in such assurance of title against all persons whatsoever. As, in the first section, it is expressly provided that a party in possession for seven years shall be protected to the entire extent of the boundaries described in the deed, we cannot suppose that the legislature intended to adopt, under the second section, a different rule as to the extent of possession in the case of a party who is in the actual occupation of part of a tract the boundaries of which are described in a title bond or unregistered deed, by virtue of which he entered and holds possession. That the second section does not expressly enact that a party shall be protected in the enjoyment of all the land included in the assurance, by virtue of which he holds it, is to be accounted for by the fact that the legislature knew it would apply to many cases in which neither party would be in possession of the land sued for. Such was the case of *Dunlap vs. Gibbs*, 4 Yer. 94, and *Neal vs. East Tennessee College*, 6 Yer. 190.

Numerous other cases will arise for the application of the second section where the question of possession will not be

JACKSON,
April, 1839.

Brown
v
Johnson.

involved; and hence the language employed in the first section would have been most inappropriate in a large class of cases proper for the application of the second. Having too, immediately before, declared that the possessor should be protected as to all the land included in his assurance, it is fair to presume that, in an appropriate case for the application of the principle, they intended the second section to be construed by the same rule, especially as their silence (as we have seen above) is so satisfactorily accounted for.

As to the constructive possession beyond the extent of actual enclosure which a lease or title bond, by its own proper force, draws to itself, it has frequently and upon general principles been determined that if a man have a grant for a large tract and sell a part, executing to the purchaser a title bond describing such part by metes and bounds, and the purchaser take possession and hold the land so purchased for seven years, he will be protected under his vendor's grant against an older title to the extent of the boundaries described in the title bond. *McClung vs. Ross*, 5 Wheaton, 123. So if a man lease part of a tract for which he has a grant or deed describing such part by metes and bounds, his tenant's possession, having been held seven years, will extend to the boundaries of the lease and to that extent and that only protect the landlord's title against a person claiming under an older grant. *Ross vs. Cobbs*, 9 Yer. 471: 10 Peters' R. 444.

In this and similar cases where a party takes possession of land claiming under a title, legal or equitable, an estate in fee simple or for years only, the possession of part is construed to be possession to the whole extent of the boundaries described in his assurance of title.

The act of 1819, sec. 1, by its express provisions, and the act of 1797, by judicial construction, gives protective efficacy to the possession under a deed or assurance purporting to convey a fee to the limits for which it calls, without reference to the title of the person making such assurance or its connexion with the grant; and in like manner, therefore, the possession under the provisions of the second section, by virtue of a title bond, articles of sale, or informal muniments, will be effectual to the limits claimed and called for, without re-

ference to the title of the person who may confer upon such possessor his claim, or the connexion that may exist between that claim and any other title. Possession is a matter of legal construction. A man can actually occupy but a few inches of land at any one time. The law, therefore, to protect him in the enjoyment of that over which he exercises dominion and considers as his own, has given to a constructive possession all the force and efficacy which belongs to an actual occupation; hence, a tenant who has a lease of which he is in possession may maintain trespass for cutting timber on the lands within the boundaries of his lease; taking possession of part, and claiming to certain boundaries described in his deed, title bond or lease, the law considers him in possession of the whole.

JACKSON,
April, 1839.

Brown
v
Johnson.

If, for all these purposes, a possession of part shall be deemed a possession of the whole tract, it cannot be conceived that the legislature, in enacting a law expressly to protect possession, should have intended to protect to the extent only of the actual occupation or enclosure. In this particular there is no difference between the object of the first and second sections. The act of 1819 was passed at a time when the State was agitated from centre to circumference by the great number of suits then pending, involving the construction of the act of 1797, and a contest existed at the bar and on the bench upon that subject, so that, in the language of the preamble, no man knew "from whom to take or buy land." The great object was to quiet titles by the protection intended to be afforded to the possessor of land. But although it was intended to protect every possessor who may be found to have been in the uninterrupted enjoyment of land for seven years, the character of that protection would depend upon the description of title under or by virtue of which the party may claim. If it purport to vest in him an estate in fee simple, the first section was intended to give to his possession all the energy of the act of 1797, conferring on him a complete and valid title to the land against all the world; but if his possession were taken by virtue of an assurance, which did not purport to vest in him an estate in fee simple, but which described by metes and bounds the lands

JACKSON,
April, 1839.

Brown
v
Johnson.

so claimed, the second section, without conferring on him the title, constitutes, like the act of 1715, a bar to the action of another person against him. As, therefore, by the uniform construction the courts of North Carolina gave to the act of 1715, a claimant's remedy against a possessor, after seven years uninterrupted enjoyment, was barred to the whole extent of the boundaries described in his "color of title;" so the second section of the act of 1819, in using language of like import, must be understood as having been intended to produce a like effect.

The act of 1819 re-enacts all the provisions of the acts of 1715 and 1797, and extends the operation of the first section even beyond the popular construction of the act of 1797; besides, by its provisions, so precise and definite, forever removing all doubt as to the application of its principles. The second section in like manner is more comprehensive than the act of 1715, making provision for many cases not included in that act, but certainly providing for every case it would have protected, and to that extent the whole protection would have been afforded.

These two acts (1715 and 1797) thus form the basis of the act of 1819, and while its second section is similar in its language and identical in its mode of operation with the act of 1715, its framers must have intended that it should operate to protect such possession as by the construction of the courts the act of 1715 was made to protect. It may be observed too, that as our courts have gone further in the construction of the second section of the act of 1819, in the case of *Dyche vs. Glass*, 3 Yer. 397, as we believe, with the unqualified approbation of the profession, than the courts of North Carolina went in the construction of the act of 1715, it would be strange inconsistency if, upon the question now under consideration, we were to stop short of the protection which was afforded a possession under the act.

We have thought fit to say thus much in illustration of our construction of this statute because the argument against it has been pressed with so much earnestness and ability, and because it is insisted, notwithstanding the decisions heretofore made. It is true the precise state of facts now under consid-

JACKSON,
April, 1839.Brown
v
Johnson.

eration has not existed in any preceding case, but whenever the question has come up for adjudication the views we now entertain have been expressed by the court. The case of *Dyche vs. Glass* was the first in which the court was called upon to give a construction of the second section of the act of 1819 now under consideration. It is true in that case Dyche was protected to the extent of his enclosure only. And why? Because he had not been holding seven years by virtue of any paper title whatever. He could only be regarded, therefore, as a naked trespasser. There was nothing to designate the extent of his possession but his enclosure; in fact he had no possession for seven years beyond his enclosure, consequently he could only be protected to that extent. But the Chief Justice, in delivering the opinion of the court, makes the following remarks: "The second section was intended to protect possession under title bonds, unproved and informal deeds, not subject to be registered or not of record in legal form, and every variety of claim supposed by the possessor to communicate title, legal or equitable, evidenced by writing, whether in fact of any validity in law or equity or not." Evidently, his honor, by this language, meant that the protection which in the specified cases was intended to be afforded, should extend to the boundary described in such title bond, unregistered deed, &c. As evidence that such was his meaning, in a late decision in the case of *Scott's lessee vs. Reid*, in the federal circuit court at Nashville, (to which he has been transferred,) he instructed the jury that unregistered deeds might be considered "as informal papers, furnishing evidence of the boundaries and extent of the possession of the defendant, under the second section of the act of 1819."

In the case of *Jones vs. Perry*, 10 Yer. 59, the court say "we think it clear that a party who is in possession for seven years of a tract of land, holding it adversely under and by virtue of an unregistered deed, is protected by the second section of the act of 1819 to the extent of the boundaries of his deed." This is a direct decision of the question. The argument that the extent of Perry's possession was not in issue is made upon a misconception of the case. It is true

JACKSON,
April, 1839.

Johnson
v
Somers.

the bill was brought on the ground that Perry's deed was void, and to remove the cloud from his title; but as an incident to the decree which was mainly sought, the court had jurisdiction to put the complainant in possession, so that the question as to the extent to which Perry's unregistered deed protected him against J. R. B. Jones, one of the complainants, was directly involved. The court declined giving an opinion as to whether an unregistered deed "purports" to convey an estate in fee simple, but decided that Perry was protected to the whole extent under the second section.

In the case of *Whitesides vs. Singleton*, (MS.) decided last winter at Nashville, it was held, on the authority of *Jones vs. Perry*, that an unregistered deed would protect a party to the extent of the boundaries described therein.

These cases settle the question beyond controversy, if the views here taken needed support from precedent, so that this case might have been rested upon them alone as authority; but we have presented our views at large that all doubts may be removed. Let the judgment be affirmed.

JOHNSON vs. SOMERS.

Somers requested M'Farland to lease a tract of land. M'Farland gave a lease of the land in writing for seven years: Held, that this was a good lease. The authority of the agent need not be in writing.

Where a landholder gave a lease upon his land by parol, and his agent afterwards, without authority in writing, gave a written lease, and the lessor addressed a letter subsequently to the lessee recognising his possession of the premises as his lessee, it was improper for the court to have decided that such letter was written in reference to the first parol lease, and upon that assumption to have rejected the testimony. The letter was competent evidence and should have been submitted to the jury, leaving them to determine whether such letter was written in reference to the first or second lease, and how far such letter was an approval of the act of his agent.

John Somers obtained a grant on the 2d day of August, 1824, from the State of Tennessee for three thousand eight hundred and forty acres of land lying in the 12th district in

Weakley county, in the 1st range and 7th section. Somers, a resident of Wilson county, requested B. M. M'Farland, a resident in the vicinity of the land, to grant leases on it for him. He, however, gave M'Farland no written authority to act upon his directions, nor was his request more specific than as stated. Somers having made some leases himself for the term of seven years of parts of the tract, M'Farland wrote and delivered the following instrument to John M. Castleman:

JACKSON,
April, 1835.

Johnson
v
Somers.

"I have leased to John M. Castleman one hundred acres of land lying in Weakley county, to be laid off so as to include all the improvements which said Castleman has made, not running further east than fifty yards from the house; and the said John Castleman binds himself to leave what land he may clear under a good eight rail fence with a good pole at the bottom. If the said Castleman should trade the above lease, said Castleman is bound to dig a well; but if not traded, he may do as he pleases on that subject. Seven years is given to said Castleman from the 1st day of January, 1835.

"January 7, 1835.

JAMES SOMERS,

Done by B. M. M'FARLAND."

Castleman had been put in possession of the premises previously by Somers, and had made the improvements mentioned in the lease. On the 5th day of December, 1835, Somers addressed a letter to Castleman, in reply to a letter from Castleman, in which he says: "You say you wish to know something in relation to the lease I let you have: you want to know if I will take the clearing of land in the place of digging a well; cleared land is no object with me; my object in giving the lease was only to accommodate you. Water is scarce and I would rather have the well dug. If you wish to trade the lease, I will take it back on terms which I think right. When I come to that country next spring I can see you on the subject."

On the 27th day of February, 1836, Castleman sold and transferred his claim of lease to Willis Johnson by the following instrument:

"Know all men by these presents, that I, John Castleman, have this day bargained, sold and delivered the within lease

JACKSON,
April, 1839.

Johnson
v
Somers.

to Willis Johnson, his heirs and assigns, for the sum of sixty dollars to me in hand paid by the said Willis Johnson. This 27th day of February, 1836. JOHN CASTLEMAN."

Somers gave Johnson notice by letter to quit the premises, and he refused to do so. Somers instituted this action of ejectment against him in the circuit court of Weakley county on the 3d day of May, 1838. Johnson pleaded not guilty; and issue being taken thereupon, the case was submitted to a jury at the October term, 1839. Harris, the presiding judge, excluded from the consideration of the jury the letter and lease, and charged them that the authority from Somers to M'Farland did not authorize him to make the lease in question, and was not binding on him till expressly ratified by him; that Castleman was a tenant at will of Somers, and that Johnson was also; that if the plaintiff had notified Johnson by letter to quit the premises, such notice was sufficient, and they should find for the plaintiff.

The jury returned a verdict for the plaintiff, and a new trial being refused and judgment rendered, the defendant appealed in error.

Williams, for plaintiff in error. 1. The statute of frauds, 1801, ch. 25, sec. 1, requires that leases of land of longer duration than one year shall be in writing, but it does not require that the authority of an agent to make such a lease shall be in writing. *Talbot vs. Bowen*, 1 Marshall, 436.

2. Somers being informed of the lease, and not having dissented in a reasonable time, is bound by it. 1 Cain's Rep. 539: 1 John. Cases, 110: 12 John. Rep. 300: 2 Kent's Com. 478.

3. The court should have permitted the letter of Somers to Castleman to have been read to the jury; they were the proper persons to have determined in reference to what lease it was written. 12 Mass. 237, 240.

Fitzgerald, for defendant in error.

REESE, J. delivered the opinion of the court.

The record in this case shows that the only contest before the jury in the circuit court was as to the validity of the

written lease made by M'Farland, the agent of Somers, to Castleman, and by the lessee transferred to the defendant. The testimony fully establishes the fact that the agent had verbal authority from his principal to make a lease to Castleman. The court charged the jury that the authority from Somers to M'Farland, the agent, was insufficient, that Somers was not bound by the lease, and that Castleman was but the tenant at will of Somers, and so likewise was the defendant. The statute of frauds, 1801, ch. 25, sec. 1, requires that the promise or agreement upon which, in the various cases mentioned in that compendious and comprehensive section, an action shall be brought, some note or memorandum thereof shall be in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized; but the statute does not require that the authority of the agent or the evidence of his agency, in order to be lawful, shall be in writing. The first and third sections of the statute of 29 Charles II, ch. 3, which relates to leases, &c. requires, indeed, the writing be signed by the parties making it, or their agent, authorized by writing. This latter requisition is omitted in the 4th and 17th sections of the English statute referred to, as it is also in our statute. The rule, therefore, adopted there as to contracts for the sale of land arising under the 4th section of their statute, that the power or authority of the agent need not be in writing, would exist here under our statute as to leases for more than a year, as well as to the other cases mentioned in this section. It is true, as remarked by Mr. Sugden, (Vendors and Purchasers, 121,) that it is in all cases highly desirable that the agent should have a written authority, for when he has merely a parol authority it must frequently be difficult to prove the existence and extent of it. We think, therefore, that the court erred in charging the jury that the agent had no sufficient authority, so far as the charge is predicated upon the want of written authority merely. We are of opinion, also, that the court erred in excluding from the jury the letter of Somers to Castleman, because, in connexion with the other evidence, it was competent and relevant testimony, tending to show, to say the least of it, the authority of the

JACKSON,
April, 1839.

Johnson
v
Somers.

JACKSON,
April, 1839.

Crockett
v
Latimer.

agent and the approval of his act by his principal. That the letter did not relate to the written lease made by M'Farland to Castleman, was an assumption which we think the court should not have made, but should have permitted the letter to go to the jury in connexion with the other testimony. Let the judgment therefore be reversed, and a new trial be held in this cause when the errors herein referred to may be corrected.

CROCKETT vs. LATIMER.

Brown contracted to build Crockett a brick house at eight dollars per thousand for the brick; Crockett was to advance money to the hands employed by Brown in making the brick, which advances Crockett was to charge to Brown: Held, that the brick made by Brown under this contract were his brick till put in the house, and were subject to executions against Brown.

Where a person, acting under a void deputation, levied on property, and the property, together with the execution, was returned into the hands of the sheriff and by him sold: Held, that such sheriff was protected by such execution in a suit against him.

John Crockett instituted an action of trover in the circuit court of Carroll county on the 20th October, 1831, against James Latimer for the recovery of the value of a kiln containing ninety thousand burnt brick, seized and converted by Latimer. The defendant pleaded not guilty, and issue was taken thereupon. The cause was continued till the March term, 1836, when the death of Crockett was suggested, and W. Caldwell, his administrator, was admitted to come in and prosecute the suit. At the November term, 1836, Judge Read presiding, it was submitted to a jury upon the proof, and a verdict rendered for the plaintiff for the sum of four hundred and seventy-one dollars and fifty cents. This verdict, upon motion, was set aside and a new trial awarded to the defendant. It was submitted to a second jury at the September term, 1838, Judge Martin presiding. It appeared in proof, that in the month of July, 1831, Crockett contracted with Henry H. Brown to build him a brick house in the town of Huntingdon, at eight dollars per thou-

sand brick, and as Brown was poor and embarrassed, Crockett was to advance money in payment of the workmen Brown might employ to assist in making and in laying the brick, with which advances Brown was to be charged as part payment for the house. The brick were made specially for Crockett, who advanced nearly all the money that was paid to the hands who were engaged in making them, but the money so advanced was charged to Brown. Brown with the hands made ninety thousand brick, and having determined to remove to Perry county, notified Crockett that he could not stay to put them up in pursuance of the agreement. Brown and Crockett thereupon had a settlement, to wit, on the 26th day of September, 1831, in which settlement Crockett allowed Brown four dollars per thousand for the ninety thousand burnt brick, and after crediting the value of the brick with the sums advanced by Crockett in making them and other expenses incurred, the balance due to Brown was appropriated to the discharge of notes and mercantile accounts due from Brown to Crockett.

JACKSON,
April, 1839.

Crockett
v
Latimer.

It further appeared in proof that Gilbert Hart recovered a judgment in the county court of Carroll county at the June term, 1831, to wit, on the 14th day of June aforesaid, against H. H. Brown for the sum of one hundred and twenty-seven dollars and fifty cents and cost of suit, and that a *fi. fa.* issued on the said judgment on the 26th day of September, 1831, bearing test the second Monday in September and returnable the second Monday in December ensuing, commanding the sheriff of Carroll county to make the debt and costs aforesaid. The *fi. fa.* came to the hands of James Latimer, the defendant in this suit, sheriff of Carroll county, on the same day it was issued. He handed the said writ to one James Baker, with the following written deputation accompanying the delivery:

"I, James Latimer, sheriff of Carroll county, authorize and empower James Baker to levy an execution of Gilbert Hart against H. Brown on any property belonging to said Brown in this county which said Hart may show, and to advertise and sell the same.

JAMES LATIMER."

Baker was not a general deputy. Latimer had two gen-

JACKSON,
April, 1839.

Crockett
v
Latimer.

eral deputies, but only one of them was in the active performance of his duties. On the back of the *fi. fa.* were the following endorsements:

"Come to hand same day issued.

JAMES BAKER, Dep. Sh'ff."

"Levied the within execution on a kiln of brick as the property of H. H. Brown this 27th of September, 1831.

JAMES BAKER, Dep. Sh'ff."

"The brick hereby levied upon sold for the sum of one hundred and sixty-five dollars, the property in which was, at the time of the sale, claimed by John Crockett; sale made and money received therefor. JAMES LATIMER, Sh'ff."

Judge Martin charged the jury that the plaintiff, in order to entitle himself to recover, should show a right of possession at the time of the issuance of his writ; that rights resting in contract could not be the subject of an action of trover. The court also charged the jury that they should look to the rights of the parties as they existed at the date of the plaintiff's execution; that the execution was a lien upon all the personalty of Brown from its test, and that any subsequent sale and delivery of his property by Brown could not alter the plaintiff's right to have such *fi. fa.* satisfied out of Brown's property so sold and delivered. The jury rendered a verdict for the defendant. A motion to set aside the verdict was made and overruled and judgment rendered, from which the plaintiff appealed in error.

A. W. O. Totten, for plaintiff in error. 1. The plaintiff's title is good by the terms of the contract; the brick were made expressly for him, in consideration of advances made by Crockett as the work progressed, and without which they would not and could not have been made. By far the greatest portion of the labor, funds, &c., employed in the making of them were furnished by Crockett; they were identified and made specific as Crockett's brick. The proceeds of Brown's labor, under the terms of this contract, belonged to his employer, he having only a lien on the brick for his services. In *Blake vs. Nicholson*, 3 M. and S. 167, the defendant, who was a printer, had been employed

by S. to print a certain number of a work at a certain price for each number; the work being printed but not delivered at the time, S. became bankrupt: it was held that the legal title to the printed work vested in S. as each number was printed, the printer having only a lien for compensation. 12 Petersd. Abr. 264. In *Woods vs. Russell*, 5 B. and A. 942, determined in 1822, "A contracts with B to build a ship and furnish her with every requisite for sea; the price to be paid by four instalments, two to be paid in the progress of work, and the others when the vessel should be finished and launched. The first two instalments were paid at the time stipulated. The ship remained in the builder's yard unfinished and his hands at work upon her until the 3d July, and on the the 30th June preceding the builder had committed an act of bankruptcy; the purchaser took possession of the ship on the 2d July, while she remained on the builder's wharf: held that the general property vested in the purchaser when he had paid half the estimated value of the ship, because the bargain had stipulated for the advances, because they were regulated by the progress of the work, the effect of which was to identify the ship and make it specific as the one the purchaser was to have." Reported also in 3 Petersd. Abrid. 785. It is admitted that when an order is given to a tradesman to make an article for the purchaser, as a ship or a watch, and it is not finished nor delivered, no property has vested in the purchaser "unless it has been stipulated otherwise." 1 Chit. Gen. Prac. 125. The case of *Mucklow vs. Mangles*, 1 Taunt. 318, determined in 1808, is relied upon as an authority to sustain this principle. This is an extreme case, and perhaps not tenable on principle. It decides that where a party contracted with a builder for a barge, and paid him the whole value in advance, and the builder became bankrupt before the completion of the work, he was still the reputed owner within the meaning of the statute 21 Ja. 1, because the barge the purchaser was to have remained unspecific till delivery; it was not identified by the terms of the contract, and the builder had a right to retain that barge and deliver another. From the cases may be deduced the following rule: when a vendor is to make an

JACKSON,
April, 1839.

Crockett
v
Latimer.

JACKSON,
April, 1839.

Crockett
v
Latimer.

article for the purchaser, and in the progress of the work it becomes specific and identified by the terms of the contract as the article the purchaser is to have, the general property vests in the purchaser before its completion and delivery.

2. The levy was made by a special bailiff under a warrant in writing not under the official seal of the sheriff. By the act of 1821, ch. 12, the sheriff may appoint two regular deputies, and may also make special deputations. The sheriff had two regular and known deputies, though one of them was not in the active performance of the duties of his office. The officer who made the levy on the brick was not one of the regular deputies, but a special bailiff acting under the warrant of the sheriff. If the warrant had no seal it was void, and conferred no power on the special bailiff to make the levy; his act in seizing those brick in execution was a trespass; the subsequent sale thereof by virtue of such levy was a nullity, and communicated no title to the purchasers.

At common law the officers of the sheriff are his under-sheriff, bailiffs, jailer, replevin clerks and county clerks, all of whom are appointed by letter of attorney under seal, or by entry on the records of the county court. Watson on the Office of Sheriff, 25, 28, 34, 350, 5 Law Library. The under-sheriff has general plenary power to perform all the ministerial duties of the sheriff. Ib. 31. He may appoint the other officers of the sheriff, as a bailiff. Ib. 57, &c. Common bailiffs are the ordinary officers of the sheriff, and are bound in an obligation with sureties for the faithful discharge of their duties. Special bailiffs are appointed by the sheriff merely for the execution of a particular writ, at the instance of the plaintiff, (Watson's Sheriff, 35,) and for whose conduct the sheriff is not in any respect liable at the suit of the plaintiff; "he is not the general recognised officer of the sheriff like the under-sheriff; it is from the warrant and not from his appointment as a sheriff's officer that the bailiff derives his authority to execute the writ;" the sheriff is not liable for his acts without proving the warrant: if he act in his office without a regular warrant, he is a trespasser, nor will a warrant subsequently sealed and delivered to him legalize his act. Watson's Sheriff, 36. *Drake vs.*

Sikes, 7 T. R. 113: 3 Stark. Ev. 1337: *Hall vs. Roche*, 8 T. R. 187: *Taylor vs. Richardson*, 8 T. R. 505: 4 T. R. 119.

JACKSON,
April, 1839.

Crockett
v
Latimer.

In executing a writ, a sworn and known officer, be he sheriff, under-sheriff, bailiff or sergeant, need not show his warrant or writ when he cometh to serve it, although the party demandeth it; but a special bailiff must show his warrant if the party demand it, otherwise he need not obey it. *Watson's Sheriff*, 58.

Now this warrant, which is the sole power of the special bailiff to act as the special agent of the plaintiff, must be a letter or power of attorney, under the hand and seal of the sheriff, otherwise it is a perfect nullity. *Watson on the Office of Sheriff*, 57: 2 Saund. Rep. 305, a, note 13: *Cro. Eliz.* 53, *Norwich vs. Bradshaw*. For form of warrant on *fi. fa.* see *Watson*, 378.

The execution, therefore, and the proceedings thereon, conferred no right on the defendant, furnished no protection to him, and as the brick were in fact delivered, the right vested in the plaintiff.

M. Brown, for defendant.

GREEN, J. delivered the opinion of the court.

We are first to enquire whether the brick in controversy belonged, when levied on, to Crockett or to Brown, the execution debtor. The evidence is, that Crockett contracted with Brown to build him a brick house at eight dollars per thousand brick, and that as Brown was poor and embarrassed, Crockett was to advance money in payment of the workmen Brown might employ to assist in making and laying the brick, with which advances Brown was to be charged as part payment for the house. The brick were made specially for Crockett, who advanced nearly all the money that was paid to the hands who were engaged in making them, but the money so advanced was charged to Brown.

We think that, according to this state of facts, the brick were the property of Brown and not of Crockett. These facts do not bring this case within the class of cases cited by

JACKSON,
April, 1839.

Crockett
v
Latimer.

the counsel of the plaintiff to show that they were Crockett's brick. Those were cases where the specific article was made for the employer and identified as his, but here no specific brick belonged to Crockett; the house was the thing he contracted for, and in payment for building which he had made advances. Had Brown built the house and part of these brick been left, most certainly Crockett would have had no claim to them. Having obtained the thing he contracted for, his agreement could not extend to and compel him to pay for any surplus materials, although prepared by the workmen expressly for his house. In the cases referred to in the argument, the ship was built upon a special contract and advances in payment of the work were made as the work progressed, according to the contract, thus designating that particular article as the property of the person for whom it was made; but if the question had arisen whether the timbers that had been prepared for the ship belonged to him for whom the ship was to be built, the case would have been very different. It never would have been held that every stick of timber as it might be prepared belonged to him for whose ship or house it was intended.

2. Is the sheriff protected by the execution in virtue of which he sold the brick? We think he is. The execution bears test before the time Crockett purchased the brick from Brown, and consequently was a lien on Brown's property and bound these brick. But it is insisted that the levy was void, because the levy of the execution was made by a special deputy, whose authority was not under seal. If the question necessarily arose, we should hesitate long before we would decide that the written authority of a sheriff to a special deputy is void unless it be under his seal; but the question does not arise in this case in such way as to make it indispensable that we should decide whether this deputy had power to make the sale or not. It is true, the levy was endorsed by the special deputy, but the execution was returned by him to the sheriff, who himself proceeded to make the sale. This suit is brought against the sheriff, Latimer, for his conversion of the property; but if he took the brick into possession, having the execution in his hands

by virtue of which he made sale and delivered them to the purchaser, he is protected whether the deputy had power to make the levy or not. Let the judgment be affirmed.

JACKSON,
April, 1839.

Banks
v
Wilks.

BANKS vs. WILKS.

Wilks obtained a decree in chancery "that the title to slave, George, be vested in complainant on the 9th day of July, or at any time thereafter, by his paying to James Tate one hundred and thirty dollars, the amount of the lien of said Tate on said slave." Held, that said decree vested the legal title to the slave in Wilks, and that he could maintain an action for the seizure and conversion of said slave by a third person without a payment or tender of the money specified in the decree to Tate.

Benjamin Wilks instituted this action of trespass on the case on the 10th day of September, 1834, in the circuit court of Carroll county, against Thomas Banks.

The facts of the case are as follows: In July, 1830, the plaintiff, holding a note of hand upon one Haywood Bledsoe for the sum of seven hundred dollars, assigned the same to his brother, Jesse Wilks, and requested him to purchase a negro man, George, therewith, from said Bledsoe for him. Jesse Wilks did purchase the boy and entered a credit on the note for the sum of five hundred dollars, and took a bill of sale of the slave to himself instead of to his brother, the plaintiff in this action. On the 9th day of July, a few days after the purchase of the slave, Jesse Wilks executed and delivered an absolute bill of sale for said slave to one James Tate, acknowledging the receipt of the consideration money, to wit, seven hundred dollars, and warranting the title. His deed was duly proven and registered; but it does not appear that Benjamin Wilks had any knowledge of this conveyance at the time it took place. Jesse Wilks died shortly afterwards, and Yancy Bledsoe obtained letters of administration upon his estate from the county court of Carroll.

On the 29th day of September, 1832, the present plaintiff filed his bill in the circuit court of law and equity sitting at Huntingdon, for the county of Carroll, against Y. Bledsoe, administrator of Jesse Wilks, deceased, and Jas. Tate, charging

JACKSON,
April, 1839.

Banks
v
Wilks.

that the slave, George, was purchased with his funds and belonged to him, and that the bill of sale made by Jesse Wilks to Tate was fraudulent, and praying the title of the slave should be vested in him; and on the 11th September, Bledsoe filed his answer to the bill. He admitted that the slave was purchased with the funds of Benjamin Wilks, and that he heard Jesse Wilks, some short time before his death, state to Benjamin Wilks that slave, George, was the property of Benjamin, and that he would arrange the title papers. He stated further, that Jesse Wilks in his lifetime had given some lien upon the slave, but upon what consideration he did not know.

This answer was written by the counsel of the complainant.

On the 31st September, 1832, Tate filed his answer. He charged that the bill of sale was taken in the name of Jesse Wilks for the purpose of defrauding the creditors of Benjamin Wilks; made an exhibit of a bill of sale from Jesse to himself, as above set forth; alleged that Benjamin Wilks was present at the execution of said bill of sale and asserted no right to the slave, George, either legal or equitable, and gave him no notice of any claim; and insisted that he had a valid title to the said slave.

At the October term, 1832, of said circuit court of law and equity the following decree was entered:

"B. WILKS vs. Y. BLEDSOE, ADMINISTRATOR, AND JAMES TATE. This day came the parties aforesaid, by their counsel, and thereupon, by agreement of the parties, with the assent of the court, it is ordered, adjudged and decreed that the title to the negro man, George, be vested in complainant on the 9th day of July, 1832, or at any time thereafter, by his paying to the defendant, James Tate, one hundred and thirty dollars, the amount of the lien of said Tate on said slave; said Tate is also to have the benefit of a note on James R. Williams for seventy-five dollars, he paying ten dollars, for which said note is now pawned; and it is further ordered, adjudged and decreed that said defendant, Yancy Bledsoe, administrator, pay all the costs of this suit, to be levied of the proper goods and chattles, rights and credits of the estate of said

Jesse Wilks, deceased, which have or may hereafter come to his hands to be administered, and that execution issue," &c.

JACKSON,
April, 1839.

Banks
v
Wilks.

Benjamin Wilks did not discharge the debt due to Tate set forth in this decree, and the slave remained in the possession of Tate till the 11th day of July, 1833, when he was seized by the present defendant, Thomas Banks, the then sheriff of Carroll county, by virtue of an execution in his hands, issued on the 29th June, 1833, on a judgment obtained in the county court of Carroll county at the December term, 1832, by Robert Murray against Yancy Bledsoe, administrator of the goods, &c. &c. of Jesse Wilks, deceased, for the sum of ninety-seven dollars and twenty cents and costs.

The slave was sold at public auction in the town of Huntingdon on the 24th August, 1833, and Yancy Bledsoe purchased him for the sum of five hundred and ten dollars.

B. Wilks instituted this action against Banks to recover the value of this slave, and filed his declaration at the July term, 1835. There were two counts. The first was in trover. The second set forth "that the plaintiff, on the 2d day of September, 1834, was the beneficial owner of a certain negro man, a slave for life, named George, of the value of one thousand dollars; and that by a decree of the honorable the circuit court of Carroll county, rendered at the October term, 1832, the legal title to the said slave was to be vested in plaintiff on the 9th day of July, 1833, or at any time thereafter, by said plaintiff paying to one James Tate one hundred and thirty dollars, the amount of lien said Tate held on said slave; and said plaintiff says that he was entitled to the benefit of said negro on the payment of said one hundred and thirty dollars; and said plaintiff in fact further says, that before the payment of said one hundred and thirty dollars by plaintiff to said Tate, and while the negro still remained in the legal possession of said Tate, the said defendant, intending to deprive him of his interest in said negro, seized, took and carried said negro out of the possession of said Tate, and afterwards, to wit, on the day and year aforesaid, in the county of Carroll aforesaid, converted and disposed of said negro slave to his own use, whereby the said plaintiff is

JACKSON,
April, 1839.

Banks
v
Wilks.

greatly aggrieved and deprived of the opportunity of redeeming said slave from said lien so held on him as aforesaid," &c. &c.

The defendant pleaded not guilty to the first court, upon which issue was joined, and demurred to the second, and plaintiff joined in demurrer. At the July term, 1836, Martin, presiding judge, overruled the demurrer, and upon the affidavit of the defendant gave him leave to plead to the second count.

The defendant pleaded: 1. Not guilty; upon which issue was joined. 2. That at no time or period before the commencement of the suit or action or since had the plaintiff the actual possession of said slave, George, nor at any time any legal right or property in or to said slave, to entitle him to the constructive possession of said slave, George. To this plea plaintiff demurred and defendant joined in demurrer. 3. That Robert Murray recovered a judgment in the county court of pleas and quarter sessions for the county of Carroll against Y. Bledsoe, administrator of Jesse Wilks, deceased, for the sum of ninety-seven dollars and twenty cents and costs, and that an execution was thereupon issued and come to his hands as sheriff of Carroll county, and that by virtue of such execution he seized said slave as the property of Jesse Wilks, deceased, in the hands of his administrator, as he might lawfully do, and that the said slave was the property of said Jesse Wilks, and that the decree set forth in the plaintiff's declaration was obtained by fraud and by collusion between said Bledsoe, administrator, and said Benjamin Wilks. To this plea plaintiff replied that the decree was not obtained by fraud and collusion, and issue was joined thereupon. 4. That the decree was fraudulently and collusively obtained for the purpose of cheating the creditors of said Wilks, deceased, and that defendant as sheriff seized and sold said slave, and that said plaintiff did not at any time pay or tender to said Tate the sum of one hundred and thirty dollars so as to give him any legal title to the said slave, &c. To this plea there was a demurrer and joinder in demurrer.

The cause was continued till the July term, 1837, at which time the issues of law on the second and fourth pleas of the

defendant were determined by Harris, the presiding judge, in favor of the plaintiff. The issues of fact were then submitted to a jury, who being unable to agree, a mis-trial was entered and the cause continued. At the November term, 1837, it was again submitted to a jury. The decree in chancery and the exhibits thereto, the judgment and *fi. fa.* of Murray were read to the jury. The administrator, Bledsoe, was introduced and denied unequivocally any fraud in the contract, and affirmed the title of B. Wilks to the slave in question. Some testimony of a circumstantial nature was introduced to establish a fraudulent intent in the procurement of the decree which it is not necessary to be set forth here.

JACKSON,
April, 1839.

Banks
v
Wilks.

Harris, presiding judge, charged the jury that if they found that the plaintiff had an equitable right to redeem the negro in controversy from Tate upon the payment of the sum of money mentioned in the plaintiff's declaration, and that he had been deprived of that right by the seizure and sale of him by the defendant, that he was entitled to a verdict for the value of the slave at the time of the seizure and conversion, deducting therefrom the amount then due from plaintiff to Tate, as above mentioned, with interest on the remainder up to that time; that the decree which had been read to them was evidence of such equitable title; that it was conclusive upon the parties to said decree, and that it was *prima facie* evidence against the creditors of Jesse Wilks, deceased, but that they had a right to assail it on the ground of fraud; that the jury were not to determine whether the facts in the cause authorized the chancellor to make the decree, but they should decide whether or not the decree was procured by a fraudulent combination between the plaintiff and Bledsoe, the administrator of Jesse Wilks, deceased, for the purpose of hindering, delaying or defrauding the creditors of Jesse Wilks; if so, although it was binding upon the parties, yet it was fraudulent and void as to the creditors of said Jesse.

The court further charged the jury, that if the defendant took the negro in controversy before the plaintiff had redeemed him and then sold him, it was such a destruction

JACKSON,
April, 1839.

Banks
v
Wilks.

of the plaintiff's right of redemption as would sustain the action. The court further charged the jury that it was not indispensable to a recovery that the plaintiff should have either paid or tendered the money due by the decree to Tate.

The jury returned a verdict in favor of the plaintiff for the sum of four hundred and sixty-sixty dollars and eighty-seven cents. A motion for a new trial was made and overruled. A motion was then made in arrest of judgment and overruled, and judgment having been rendered in conformity with the verdict the defendant appealed in error.

Totten, for the plaintiff in error. 1. To entitle the defendant in error to recover on the count in trover he must prove an existing right of property and possession in himself to the slave in question at the time of the alleged conversion. 1 Chit. Pl. 137; 2 Saund. Rep. 47, b; *Gordon vs. Harper*, 7 Term Rep. 9; *Caldwell vs. Cowan*, 9 Yer. Rep. 262. Nor will trover lie where there is an existing lien. *Terrell vs. Rogers et al.* 3 Hay. Rep. 205. The decree in the case of Benjamin Wilks against Y. Bledsoe and James Tate is the only evidence of the right of defendant in error, and it is for the court to give it a proper construction. It shows the legal title to lie in Tate, with a right to Benjamin Wilks to vest that title in himself by paying to Tate a certain note and a given sum of money, which sum of money has never been paid. The actual possession was also in Tate. If this decree be regarded as a mortgage, it is in law an estate vested in Tate, subjected to be defeated by performance of a condition subsequent, but the legal and equitable right remains in him till that condition be performed. 4 Kent, 148, 158; 2 Story's Equity, 284, 286. The decree cannot be regarded as having the effect of a technical conditional sale from Tate to Wilks, or *vice versa*, because in such case the title must vest in the vendor at the time, subject, however, to be regained by the vendor on performance of a condition subsequent. 4 Kent, 144; *Bennett vs. Holt*, 2 Yerg. Rep. 6. If the decree be any thing it creates a right or interest in Benj. Wilks to vest in him on the performance of a condition precedent, and the condition must be performed before it can vest, whether it

be legal or equitable. 4 Kent, 120: 2 B. Com. 154: Sug. on Vendors, 60. A court of chancery will not vest an estate when, by reason of a condition precedent, it will not vest at law. 4 Kent, 120: 1 Vernon, 83. The legal effect of the decree is like the case where goods are sold on conditions to be performed by the vendor at or before their delivery; the title vests not till the conditions shall have been performed, but remains in the vendor. *Wilbraham vs. Snow*, 2 Saund. Rep. 476: *Hornflower vs. Proud*, 2 B. and A. 329: 2 Kent, 387.

JACKSON,
April, 1839.

Banks
v
Wilks.

2. The court erred in overruling the demurrer to the second count, it being in case, because that count does not show any legal injury of which a court of common law can take cognizance. It shows only an equitable interest in the defendant in error; the legal right and possession being and remaining in Tate. The right of defendant had not vested; it was uncertain and contingent, depending on the performance of a precedent condition. To maintain an action on the case for an injury to real or personal property the plaintiff must have possession or a legal vested right and title in himself, existing at the time of the injury complained of; and he must show that the act complained of is an injury to such possession or right. 1 Chit. Pl. 2: *Anderson vs. Martindale*, 1 East, 497: 8 T. R. 332: 3 Camp. 417: 3 B. and P. 584. The case of *Daws vs. Peck*, 8 T. R. 330, was an action by a consignor against a carrier for not safely carrying the goods; it was considered that the legal title vested in the consignee by delivery to the carrier; and although the consignor had an equitable or beneficial interest in the goods, the right of stoppage *in transitu*, yet the action could only be brought by the owner of the legal title. 1 Saunders on Pl. and Ev. 346. Persons having a mere equitable interest cannot sue except against wrong doers when the plaintiff is in actual possession of the thing affected. 1 Saund. on Pl. and Ev. 346: *Jones vs. Jones*, 7 Term Rep. 47: 1 Chit. Pl. 3: 1 East, 497. So where two have a joint legal interest in a contract and one die, the action shall be by the survivor alone, he having the legal right, although the deceased alone was entitled to the beneficial interest in the contract, and his exec-

JACKSON,
April, 1839.

Banks
v
Wilks.

utor must resort to a court of equity to obtain from the survivor the sum so recovered. 1 Chit. Pl. 12: 1 East, 497: *Barnard vs. Wilcox*, 2 Johns. Cases, 374: *Peters vs. Davis*, 7 Mass. R. 357: 1 Johns. Rep. 34. So where a chose in action, not being a commercial paper, is assigned, the equitable and not the legal interest passes, and the assignee must sue in the name of the assignor for his use. 1 Chit. Pl. 10: 10 East, 281: 10 J. R. 400. A *cestui que trust* can only sue when in actual possession of the thing affected, the injury being then done to the possession. 7 Term Rep. 47: 1 East, 244: 1 Chit. Plead. 52, 49: 1 Saund. Pl. and Ev. 347.

If the plaintiff in error had no right to seize the slave to satisfy Murray's debt, it is clear that Tate, who had the slave in possession as well as the legal right to him, could sue and recover against Banks, the plaintiff in error, for an injury done both to his title and possession. And if the slave was held by Tate as security for his debt against Jesse Wilks, the intestate, (which it seems was about one hundred and thirty dollars,) he had a right to the entire security he had provided, and, in an action at law against the sheriff and Murray, would be entitled to recover the whole amount of the value of the slave. The facts upon which these principles and conclusions are founded are admitted and stated in this count. If, then, Tate had a clear and undoubted right of action for the wrong complained of, can the defendant in error maintain his action for the same injury? If he can, then is the sheriff liable both to Tate and the defendant in error for the value of the slave; that is, he would be liable for twice the amount of injury he is supposed to have done, which is absurd. The law gives but one satisfaction for one injury, and the person entitled to it must not be uncertain. He that has the legal right must sue and recover the amount. See *Daws vs. Peck*, 8 T. Rep. 332: Com. Dig. tit. Merchant D: Ld. Raymond, 340. And the person who only has the beneficial interest must file his bill against the person who recovered against the wrongdoer for the amount of his interest. 1 Chit. Pl. 12.

In the case of *Yates vs. Joyce*, 10 J. R. 136, the action was sustained for an injury done to a legal lien, say the court, which injury consisted also in the destruction of the

property, and the plaintiff there had no other remedy. In the present case the interest is only beneficial or equitable, not legal, and the injury consists not in the destruction of the property, but only in a change of possession from Tate and from the defendant, and the defendant has another remedy. So of many other cases.

JACKSON,
April, 1839.

Banks
v
Wilks.

The conversion complained of does not consist in the destruction of the property; the sheriff only affected the right of possession by the seizure and sale, to which the plaintiff had no right. The sheriff's title could be no better or greater than that of the judgment debtor, because it was only his interest that was sold. The defendant in error could still have performed the condition upon which his right depended, and have acquired whatever right he was justly entitled to. It could not have been material whether the slave was in the possession of the sheriff's vendor or Tate, the legal owner, because the defendant in error could have equally asserted his right against either of them; so that, in fact, no injury has been sustained by the defendant in error. This argument would not hold good if the injury had consisted in the destruction of the slave. 2 Story's Equity, 504.

The law has provided the defendant with another and more efficient remedy if his title be good, and whether it be legal or equitable, by bill in chancery to enjoin the sale of the slave. See *Loftin vs. Espy*, 4 Yer. R. 84. Thus might the injury have been prevented. And after the sale the defendant had his further remedy by filing his bill in chancery to get possession of the property. But the principle is well settled that where the law has provided another remedy, although it be in chancery, case will not lie. See 1 Com. Dig. 281. As where a trustee refuses to perform a trust, he shall be compelled in chancery, or a sheriff to return one duly elected to parliament, for the party injured has his remedy by claiming his seat.

The present case cannot be assimilated to an action on the case for an injury done to a remainder or reversion in either real or personal property, because in those expectant estates the legal title is vested in the remainderman or reversioner,

JACKSON,
April, 1839.

Banks
v
Wilks.

to take effect in possession in future. 4 Kent, 194, 168, 254. As to reversions, 4 Kent, 350. The same law is applicable to slaves. *Cains vs. Marley*, 2 Yerger's Rep. 583: 2 Kent, 258.

The action on the case lies for an injury to a vested remainder or reversion, it being a legal right, (1 Chit. Pl. 129: 7 T. R. 9: 3 Camp. 187: 1 Com. Dig. 279, 402,) but not for a contingent remainder, the right not being vested but depending upon a future contingency, which is very similar to the present case. 4 Kent, 351.

The interest of the defendant in error, as stated in this count, is not like that which would exist in case of a pawn or pledge, for in such case the general property or legal right does not pass to the pawnee, as in case of a mortgage; and therefore the general owner might maintain his action for an injury done to the property which was pawned or pledged. See 4 Kent, 132.

M. Brown, for the defendant in error. The right of plaintiff below to redeem was a legal right. It was recognized by the common law as a right; and whenever a law recognises a right it will give a remedy. 1 Chit. Pl. 87. The negro stood in the situation of a pledge; the pawnee, in whose hands it was, had only a special property, which would determine the moment the money for which he was pledged should be paid or tendered. 4 Kent, 138. It was not like a mortgage after forfeiture, when no right remains in the mortgagor but an equity of redemption, but it was like a mortgage before forfeiture when the right to redeem is a legal right; or it is like a mortgage in which the legal right to redeem remains perpetually. The better illustration however is a pledge, where the property in the pawnee is special, the legal title remains in the pawnee, which may be sold at execution. 4 Kent, 139.

If the right vested in plaintiff below was equitable, he could sue for a destruction of that right. The distinction is between enforcing an equitable right in a court of law, and recovering damages for the destruction of that right by a tortuous act. There is no remedy against the wrong doer

in equity. It is a tort which is not determinable in chancery. To destroy an equitable right is a temporal injury for which an action can be sustained. 1 Com. Dig. 372: 11 Johnson's Rep. 154, *Yeates vs. Joyce*. If there is no remedy in case there is no remedy any where.

JACKSON,
April, 1839.

Banks
v
Wilks.

REASE, J. delivered the opinion of the court.

The counsel for the plaintiff in error has argued, with much learning and ingenuity, that in all actions at common law, as well where the plaintiff sues upon his special case as in other forms of action, it is necessary to his maintainance of the suit that the injury complained of should be either some invasion of his possession of property or should affect the value or enjoyment of property to which he has some legal right. The counsel for the defendant in error, conceding the general correctness of the principles insisted on, yet contends that there are many cases in which a party having an equitable title only to property may yet bring his special action on the case for an injury affecting the existence or value of the property or operating a deprivation of his right, on the ground that otherwise he would have no remedy either at law or equity for the wrong done him. We deem it unnecessary, and therefore improper, in the case before us to determine whether the rule laid down on the one side be universal and inflexible in its application, or whether, on the other side, the exceptions to it exist upon the principle and to the extent contended for; for we think the counsel for the defendant in error correct in the position taken by him, that the legal operation and effect of the decree set forth in the second count of the declaration, upon which the contest arises, was to vest the defendant in error not with a merely equitable but with a legal right to the slave in question. The effect of the decree was to make the title of Wilks that of a mortgage, and the title of Tate that of a mortgagee, before forfeiture; or rather, perhaps, to make the property in the possession of the latter a mere pledge and him a mere pledgee. At any time, therefore, after the decree, Wilks, by tendering the money, would have reclaimed the pledge, terminated the interest of Tate, and entitled himself to maintain the action

JACKSON,
April, 1839.

State
v
Darnal.

of detainee for the negro, if he had not been surrendered to him. This being, in our opinion, the effect of the rights of the parties produced by the legal operation of the decree set forth in the declaration, it is unnecessary to say that upon acknowledged and well settled grounds the plaintiff below had a legal and common law right to the property in question, for the deprivation of which he may well maintain an action upon his special case. As to the verdict of the jury, we think the facts shown upon the record fully sustain it. Let the judgment be affirmed.

STATE vs. DARNAL.

It is not necessary, in a presentment under the act of 1823, ch. 25, sec. 1, for treating electors for the purpose of obtaining their votes, that it should appear of record that such presentment was found on the personal knowledge of two of the grand jurors.

At the June term, 1838, of the circuit court of Obion county the grand jury returned a presentment against Henry M. Darnal in the following words, to wit:

"State of Tennessee, Obion county. Circuit court, June term, 1838. The grand jurors of the State of Tennessee, elected, empannelled and sworn, and charged to enquire in and for the body of the county of Obion aforesaid, upon their oaths present that one Henry M. Darnal, late of said county, laborer, on the 2d day of June, one thousand eight hundred and thirty-eight, and on divers other days before that time, with force and arms, in the county of Obion aforesaid, then and there being and offering himself as a candidate for an office of honor in the State of Tennessee in the county of Obion aforesaid, to wit, the office of lieutenant colonel of the one hundred and thirty-sixth regiment of Tennessee militia, in the county of Obion aforesaid, and then and there being such candidate, as aforesaid, did then and there treat the electors or common soldiers of the one hundred and thirty-sixth regiment aforesaid, at the county aforesaid, with spirituous liquors, to wit, with brandy, whisky, gin and rum, and

other spirituous liquors, directly or indirectly for the purpose of obtaining for himself the votes of the electors or common soldiers of the one hundred and thirty-sixth regiment, to the great injury of the morals of the good citizens and soldiery of the State, to the evil example of all others in like cases, contrary to the form of the statutes in such case made and provided, and against the peace and dignity of the State."

JACKSON,
April, 1836.

State
v
Darnel.

On the back of this presentment was the following endorsement: "Moses D. Harper, James M. Pounds and Alexander Edmonds, witnesses for the State." There was also the following endorsement: "A true bill;" signed by all of the grand jury, who brought the bill into open court and presented it as the finding of their body.

The defendant pleaded not guilty, and issue being joined thereupon, at the October term the cause was submitted to a jury under the charge of Judge Harris. They returned a verdict of guilty against the defendant. The defendant then moved the court to arrest the judgment. This motion was overruled and judgment rendered that the defendant pay a fine of one hundred dollars for the use of the county of Obion.

The defendant appealed in error to the supreme court.

Attorney General, for the State,

Raines, for the defendant in error.

TURLEY, J. delivered the opinion of the court.

The act of 1823, ch. 25, sec. 1, makes it an offence for any person offering himself as a candidate for any office of honor, profit or trust, to treat the electors, for the purpose of obtaining their votes, with spirituous liquors, and provides that the act shall be given in charge by the judges and solicitors to the respective grand juries, whose duty it shall be to present all such offenders when two or more of the body have knowledge of the fact, and not otherwise.

Under the provisions of this statute the plaintiff in error was convicted of the offence therein prohibited in the court below, and moved an arrest of judgment, which was overruled, from

JACKSON,
April, 1839.

State
v
Dargal.

which judgment he prosecuted his writ of error to this court. And it is now contended that the judgment of the inferior court is erroneous, because it does not appear that the presentment was found upon the knowledge of two or more of the grand jurors. The presentment is in the form of a bill of indictment, and is signed individually by the grand jurors who returned it. In England, as we have had occasion heretofore to observe, an offender never was put upon trial upon a presentment, but on a return of a presentment by the grand jury, which was merely an informal information of the offence having been committed, the attorney general prepared a bill of indictment thereon, stating an offence in legal and technical form, and upon this the person charged was put upon his trial. But such has not been the practice in the State of Tennessee. Here, when the grand jury, or any one of their body, is cognizant of an offence, the practice is to inform the attorney general thereof in the first instance, who prepares a bill of indictment upon the information, which is delivered to the grand jury and is by them returned, instead of the old informal presentment; the consequence is that the only difference between a presentment thus made and a bill of indictment is, that the presentment is signed by all the jurors and the bill of indictment only by the foreman. This will explain why the presentment in this case is in the form of a bill of indictment.

By the common law a grand jury would only present upon the knowledge of one or more of their body, but it has never been held that it must appear from the body of the presentment or elsewhere that it had been so done; indeed, from the very nature of the oath taken by them it could not; they swear that "their fellow's counsel and their own they will well and truly keep secret," and it is of great importance that this part of the oath should be strictly observed; no man likes to stand in the attitude of an informer; it is at all times an unenviable situation, and very frequently one of danger. But it will be asked, if it need not appear that the presentment has been returned upon the personal knowledge of some one of the grand jury, what safety has the person charged against an illegal presentment. The answer is in

the integrity of the jury and the oath they have taken to present offenders according to law.

JACKSON,
April, 1839.

State
v
Darnel.

The only difference between presentments made by the common law and those authorized under the act of 1823, ch. 25, is, that the common law only requires the knowledge of one person to authorize a presentment, whereas the statute requires two. If, by the common law, there is no necessity for it to appear that the presentment was returned upon the knowledge of one of the jurors, there is no reason why it should appear to have been returned upon the knowledge of two under our statute.

That the names of witnesses are marked on the bill of indictment can amount to nothing; it may have been, and most probably was, a mere memorandum for the attorney general, in order that he might know who to call for examination on the trial; they do not appear to have been sworn or sent to the grand jury. The argument that cases of this kind are to be assimilated to indictments or presentments for the offence of assaults and batteries in the circuit courts committed during term time, in which it has always been held that it must be charged in the body of the indictment that the offence was committed in term time, will not hold, because, at that time, the county court had exclusive jurisdiction of all such offences unless they were committed in the town during the session of the circuit court. So that in the one case it is a question of jurisdiction, and in the other one of practice. Upon the whole, therefore, we are of opinion that there is no error in the judgment of the court below, and affirm the same.

JACKSON,
April, 1839.

JENKINS vs. ATKINS.

Jenkins

v

Atkins.

Jenkins, acting as the attorney in fact of Philpot, sold five hundred acres of land, belonging to Philpot, to Atkins, took the note of Atkins for the purchase money, and gave him a bond for title. Philpot died the day before the contract; neither party knowing his death at the time of the contract. This contract was void, and Jenkins having subsequently acquired a title to the land and tendering a deed to Atkins did not entitle him to a specific execution of the contract.

This bill was filed on the 29th of April, 1835, in the circuit court of Weakly county, by John Jenkins against William Atkins, in order to compel the specific execution of a contract concerning a tract of land lying in Weakly county. It was subsequently transferred to the chancery court by virtue of the provisions of the act of 1835, ch. 41. The bill charges that John W. Philpot was the owner of a tract of five hundred acres of land lying in the county of Weakly, being part of a tract of fourteen hundred and ninety-four acres entered in the name of the president and trustees of the University of North Carolina by entry No. 73, thirteenth district, third range and sixth section, and wishing to sell said tract of land, said John W. Philpot, by his deed, constituted complainant his attorney in fact to sell it; that in pursuance of such power he sold the land on the 3d day of October, 1831, to William Atkins for the sum of one thousand one hundred and twenty-five dollars, and took the promissory note of said Atkins for the said sum, due one day after the date thereof, and at the same time, as the agent and attorney in fact of said J. W. Philpot, gave a bond to said Atkins obligating the said Philpot in the sum of one thousand one hundred and twenty-five dollars to make said Atkins a good and valid title to said land; that said Philpot, after the execution of the power of attorney, and before the sale aforesaid, conveyed the land to his son, Ed. Philpot, and directed the complainant to pay over the proceeds to his said son; that on the 2d day of October, 1831, said Philpot died; that at the time of the sale of the land to Atkins he did not know of the previous death of said John W. Philpot; that since the death of John W. Philpot he and one John Terrell had obtained a

good and valid title to the land from Edward Philpot, the son of John W. Philpot, deceased, and that he was now ready to make such title as the court should direct. The bill further charges that since the death of John W. Philpot, Atkins had paid him the sum of three hundred dollars of the money due on said note of one thousand one hundred and twenty-five dollars; that he had instituted an action against Atkins upon the note, and such action had been defeated upon the ground that said contract was void; that Atkins had also sued complainant to recover back the sum of three hundred dollars paid to him, and had instituted an action against him on the bond, and that said suits were now pending.

JACKSON,
April, 1839.

Jenkins
v
Atkins.

The bill prayed that the suits against him might be enjoined, and that said Atkins should be compelled to pay him the consideration money, one thousand one hundred and twenty-five dollars, and that he should take a title to the land.

Atkins' answer was filed on the 22d May, 1835. He admits the execution of the contract as stated in the bill. He states that John W. Philpot was dead at the time of the making of the contract; that he did not know of the death of Philpot at such time; that when he paid the sum of three hundred dollars, in part fulfilment of said contract, he was aware of the fact that Philpot was dead, but did not then know that said Philpot had died previous to the execution of the note and bond set forth in the bill of complainant, on the 3d of October, 1831, and did not know that he was dead till he had made improvements of the value of five hundred dollars. He admits that he had instituted suits against the complainant to recover the value of the improvements and the sum of three hundred dollars paid in the fulfilment of the contract, but alleges that said suits were not instituted for two years after the execution of the contract aforesaid, and that said Jenkins was then unable to make him a title to the premises.

At the November term, 1835, leave was given defendant to file an amended answer. This amended answer was filed on the 28th of March, 1837. He alleges in it that John W. Philpot, previous to his death, had made a deed of gift of this land to his son, Edward, and that said Edward had institu-

JACKSON,
April, 1839.

Jenkins
v
Atkins.

ted an action of ejectment against him, returnable to the November term, 1833, of the circuit court of Weakly county, and that he had been ejected, &c. Complainant filed a general replication.

At the February term, 1838, the chancellor directed an inquiry by the clerk and master into the title of the vendor, Jenkins, to the land in controversy. The clerk and master reported that "the land in controversy was granted by the State of Tennessee to the president and trustees of the University of North Carolina; that said land was conveyed by the University to Thomas Hunt on the 18th January, 1826, (which deed was registered in the county of Weakly on the 3d of August, 1828;) that said land was conveyed by deed from said Hunt to John W. Philpot on the 14th day of April, 1827, (which deed was registered in Weakly county on the 25th October, 1827;) that said land was conveyed by Philpot to his son, Edward Philpot, by deed of gift dated the 30th of September, 1831, and registered on the 20th day of August, 1838; that said land was conveyed by said Edward Philpot to complainant, Jenkins, and John Terrell, on the 20th March, 1834, which deed was registered in Weakly county on the 18th August, 1838; and that said Jenkins and Terrell had executed and filed with the papers in the cause a deed in fee to the defendant Atkins, for the land originally agreed on between the parties." Upon examination of the deeds and exhibits filed, this report was confirmed.

At the August term, 1838, the cause came on to be heard before chancellor Brown, and being argued, he dismissed the bill. The complainant appealed.

A. W. O. Totten, for complainant. 1. It may be fairly inferred that complainant acted in perfectly good faith in the sale of the land, believing he had a power fully authorizing him to make a title. The death of his principal, being only a day before the contract, was unknown to both parties. Under these circumstances, the complainant having put himself to the trouble and expense of procuring the title, there seems to be no equitable reason or ground why defendant should not be compelled to accept it.

2. But the chancellor dismissed the bill on the ground that there was no mutual obligation existing between the parties to the contract; that Jenkins, having acted under a void power, could not bind his principal, and that, as he acted as agent only, he did not bind himself. It is fully admitted that where the obligation of a contract is not mutual, or where only one party is bound, a specific performance will not be decreed. *Parkhurst vs. Van Courtland*, 1 J. C. R. 282: 1 J. C. R. 370: Sug. Ven. 137: *Armiger vs. Clark*, Sug. Ven. 196. It is, however, insisted that the chancellor erred in applying this rule to the present case. The obligation was mutual; the complainant was bound by the contract; his obligation is predicated on the fact that he had no power to make the contract. If a person seal a bond as attorney for another without authority, he is personally liable in the same manner as if he had covenanted in his own name. *White vs. Skinner*, 13 John. Rep. 307: *Appleton vs. Binks*, 5 East. Rep. 148: 7 Term. Rep. 207: 2 Cains' Rep. 254: 4 Bur. Rep. 2108. So if an agent exceed his authority he is liable personally to a third person on the contract itself as a principal. *Dusenbury vs. Ellis*, 3 John. Cases, 70. Where a party professes to act for another and not for himself the manner of signing and executing the contract is wholly immaterial; the question is whether he had the power or not. If he had not he is personally bound, though he signed the name of his principal. If he had he is not bound, though he signed and sealed the instrument with his own name and seal. The liability of an agent, or his exemption from it, does not depend upon a thing so very immaterial as the mere form of signature, and if it contain the name of another, from whom the pretended agent has no power, such name will be regarded as surplusage and the agent as acting for himself. 3 John. Ca. 70: *Hodgson vs. Dexter*, 1 Cranch, 345: 1 Cond. Reports, 329: *Urwin vs. Walsey*, 1 Term Rep. 672. It is, however, true that where a party has a power, but executes the deed so imperfectly as not to bind his principal, the deed may be valid, because there is a principal with whom the contract was intended to be made, and with whom it might be lawfully made under the power, if it had been properly pursued,

JACKSON,
April, 1839.

Jenkins
v
Atkins.

JACKSON,
April, 1839.

Jenkins
v
Atkins.

as where the deed purports to be made with the principal, and it is signed on his part by the agent, without naming the principal. Comb's Case, 9 Co. 76: 1 Comyn's Digest, 776. But even this is an old common law rule, subject to many exceptions and modifications. It is, therefore, contended that there was sufficient mutuality in the contract to take the case out of the rule above referred to.

3. The title bond was executed by complainant without naming his principal in the penal part thereupon. Would not complainant be personally liable in an action at law for the penalty? The seal might be regarded as his own and the name of Philpot rejected as surplusage, or the writing is valid as a contract without a seal. This seems in fact to be the true construction of the contract; the effect of which would be to bind the complainant to convey or to cause Philpot to convey the land in question on payment of the purchase money. Such a contract would be enforced in equity against the vendor, as where a husband covenants that his wife shall convey or a father that his infant son shall convey title to land. Sug. Ven. 199.

4. Finally, this case addresses itself to the sound discretion of the court. The complainant sold the land in good faith, and it was by no act of his that the contract was delayed for a period in its execution. The defendant will get the object of his purchase.

J. Dunlap, for defendant.

GREEN, J. delivered the opinion of the court.

It has been insisted for the defendant in this case that there was no mutuality in the agreement set up in the bill, and that therefore he is not bound to perform it; while the complainant's counsel contends that Jenkins was personally bound by the contract he made in the name of Philpot, because of his want of authority to make that contract, and therefore the defendant is liable to him, and hence the agreement creates a mutual obligation.

It is true that in some cases a party who assumes to make a contract in the name of another, without authority to do

so, is liable personally to fulfil the obligation entered into by him. 13 John. Rep. 307: 3 John. Ca. 10. But such is not the case here. The contract was made in good faith upon the supposition that the party making it had ample authority. But the fact turned out that his authority had recently, and without the knowledge of the parties, ceased to exist by the death of the principal, so that no right was communicated to the thing agreed to be sold, and consequently there could be no obligation in Jenkins to make a title.

JACKSON,
April, 1839.

Jenkins
v
Atkins.

It is not like the case where one makes a bond for money in the name of another without authority. In such case he can fulfil the contract himself, and is bound to do it. But when one undertakes, as attorney in fact for another, to sell an article, the property of that other, he communicates to the purchaser no right to the thing sold unless he had authority to sell it. The purchaser could not in such case maintain a bill to enforce a title either against the owner or the pretended agent. The only remedy would be at law for damages. But these questions can never arise except where a remedy is sought against a party thus assuming to contract for another. In this case they have no application. The defendant did not contract with Jenkins; he intended to contract with Philpot, but as he was dead the whole agreement was void. The bond of the defendant for the money was made payable to Philpot, and if he is bound to take the land the other is bound to pay the money. But to whom is he bound to pay it? Not to Jenkins certainly. As the contract was to pay it to Philpot, it must be paid to him or to some one having a legal or equitable right derived from him. But Jenkins had no such right, and there is no principle upon which a court of equity can decree the money to him. As, therefore, the complainant has no right, legal or equitable, to demand the money that Atkins agreed to pay Philpot for the land, arising either from his connexion with the contract as the attorney in fact of Philpot or from the fact that he has subsequently become owner of the land and is willing to convey it, there is no equity in the bill, and it must therefore be dismissed with costs. Affirm the decree.

JACKSON,
April, 1839.

TUCKER VS. ATKINSON.

Tucker
v
Atkinson.

An execution creditor has the right to attach surplus monies in the hands of a sheriff, such monies not being in the custody of the law, but belonging to the defendant.

On the 12th day of February, 1839, W. D. Wilkerson, a justice of the peace for the county of Fayette, issued an attachment against E. J. Rawlings to the sheriff of Fayette county, commanding him to seize so much of the estate of said Rawlings as would satisfy the sum of one hundred and fifty dollars debt, due to A. F. Tucker, suing for the benefit of George H. Wyatt. This attachment came to the hands of the sheriff, and was by him returned to the circuit court endorsed "no property found," on the 13th day of February. On the 14th John H. Ball, coroner, gave a notice to the sheriff, N. Atkinson, to appear on the 4th Monday in February, at the next term of the circuit court of Fayette county, and answer what he was indebted to said Rawlings and what funds of said Rawlings' he had in his hands.

At the February term, 1839, Atkinson filed his answer, in which he stated that by virtue of an execution issued from the circuit court of Fayette county, which came to his hands on the 14th day of December, 1839, upon a judgment recovered at the October term thereof, 1839, by B. Harrison, for the sum of four hundred and twenty dollars and nine cents, against said Rawlings, he levied upon two tracts of land situate in said county, in the tenth surveyor's district, in range five, section two, as the property of said Rawlings; that this levy was made on the 14th day of December, 1838; that he sold the interest of said Rawlings in said land at public auction at the court-house in the town of Sommerville, in Fayette county, on the 11th February, 1838, having given notice according to law; that the land was bid off to Jesse J. Gee, at eight hundred and ten dollars, that being the highest and best bid therefor; that after deducting the amount of Harrison's judgment and cost therefrom he held in his hands the sum of three hundred and

eighty-nine dollars and ninety-one cents, the proceeds of said sale. He submitted to the court whether said sum of money was the subject of garnishment.

JACKSON,
April, 1839.

Tucker
v
Atkinson.

His honor, V. D. Barry, being of the opinion that the monies in the hands of Atkinson was the property of Rawlings, and not in the custody of law, and subject to be attached as such, proceeded to the trial of the cause, and no plea being filed by Rawlings, a judgment by default was entered up against him for the sum of one hundred and fifty dollars and costs, and against Atkinson, as garnishee, for the same sum and the further sum of three dollars and eighteen cents costs. From this judgment Atkinson appealed in error to this court.

Humphreys, for plaintiff in error.

H. G. Smith, for defendant in error.

GREEN, J. delivered the opinion of the court.

The question for decision in this case is, can surplus monies in the hands of a sheriff be attached by a creditor of the execution debtor. The act of 1817, ch. 54, sec. 1, provides, whenever any sheriff, &c. shall sell property by virtue of an execution for more than sufficient to satisfy said execution it shall be his duty to pay over such surplus money to the owner of the property so sold. The moment, therefore, that the sheriff receives a larger amount of money for property sold under execution than is required for its satisfaction he is bound to pay it over to the party whose property was sold. The reasons that have been advanced in support of the adjudications which protect monies a sheriff may have collected by virtue of an execution do not apply to the present case. These are: first, that the process of the courts would be obstructed, and their judgments rendered ineffectual; and secondly, that the money is in the custody of the law, and is not goods and effects of the judgment creditor. 3 Mass. Rep. 294-5. But in the case under consideration the process of the courts cannot be obstructed by allowing the surplus money, after the satisfaction of an exe-

JACKSON,
April, 1839.

Tucker
v
Atkinson.

cution, to be attached. The sheriff retains an amount sufficient to satisfy the process in his hands, and it cannot be affected by the disposition which may be made of the surplus. The other reason that money collected by execution is in the custody of the law has as little application to this case as the one already noticed. The act before referred to requires the sheriff to pay it over to the party whose property was sold. He is not required by the process to make such surplus money, but it comes into his custody incidentally and is not held by him by virtue of an execution; nor is the sheriff required to return such surplus money into court; but the moment he receives it he is debtor to the party whose property was sold, and therefore it can in no sense be said to be in the custody of the law.

The act of 1794, ch. 1, sec. 19, authorizes an attachment against the estate of an absconding debtor, "wherever the same may be found, or in the hands of any person indebted to or having any of the effects of the defendant." The sheriff being debtor to the party whose property has been sold by virtue of an execution against him for the surplus money, after satisfying such execution, and such surplus constituting effects of the debtor in his hands, such money may, according to the express words of the statute, be attached in his hands. Let the judgment be affirmed.

ENLOE vs. HALL.

JACKSON,
April, 1839.

Enloe
v
Hall

In an action of assumpsit for printer's fees for publishing tax sales it is not necessary to produce the paper in which such tax sales were advertised. &

If an agent makes a contract on behalf of government he is not personally responsible.

The circuit court charged the jury that the sheriff was liable to pay for advertising every tract which had been advertised at his request, unless he had shown that he had offered the lands thus advertised for sale at the time and place appointed by law, and that no person would bid the amount of taxes, costs and charges thereupon: Held, that this charge was erroneous. The receipt of money for the use of the publisher could not be presumed from the fact that the lands were levied on and advertised for sale.

George W. L. Marr instituted an action of assumpsit in the circuit court of Obion county on the 10th day of October, 1835, in the name of Allen A. Hall, for his own benefit, against Joel S. Enloe. At the November term succeeding Marr filed his declaration, containing several counts, in substance as follows:

1. In consideration that plaintiff (Hall) agreed and promised said Enloe to print, publish and advertise lands to be sold for the taxes in a newspaper published and printed by the plaintiff in Nashville, Davidson county, said defendant undertook and promised the plaintiff to pay him therefor the sum of seventy-five cents on each tract so advertised and published as aforesaid whenever he, the said Enloe, should be requested so to do; and the plaintiff avers that heretofore, to wit, on the 30th day of July, 1833, he did publish, print and advertise for the defendant a great number of tracts of land, to wit, the number of six hundred tracts, in a newspaper printed and published by him in Nashville, in the county of Davidson, of which the defendant had notice, &c.

2. That the plaintiff performed work and labor for the defendant at his request, &c. &c.

3. That the defendant had received a large quantity of money belonging to plaintiff, &c. &c.

To this declaration the defendant pleaded non-assumpsit and the statute of limitations, upon which pleas issues were formed.

JACKSON.
April, 1839.

Enloe
v
Hall.

The cause was continued till the June term, 1837, at which term the honorable W. R. Harris presiding, it was submitted to a jury. It appeared in proof that Enloe was the sheriff and collector of the State and county taxes for the county of Obion during the years 1832, 1833 and 1834, and that as such sheriff and collector he transmitted a list of the lands reported for sale by reason of the non-payment of the taxes, to be advertised for sale, to the editor of the Republican, a newspaper printed and published in the town of Nashville; that he transmitted such lists in the years 1832, 1833 and 1834; that in 1832 there were published in said paper one hundred and seventy tracts, in 1833 one hundred and eighty-one tracts, and in 1834 one hundred and thirty-seven tracts. In the year 1832 ninety-two tracts were sold, and seventy-eight in the year 1834.

The numbers in which these tracts of land were advertised for sale were not produced to the jury, nor was the non-production of them accounted for by their loss, destruction or otherwise. Several witnesses, however, testified that they had seen the advertisements, as above set forth, in the said paper in the said several years, and that Allen A. Hall was the publisher and editor of said paper called "The Republican."

Enloe exhibited two receipts to the jury, the first for the sum of fifty dollars for advertising land to be sold for taxes in 1832 and sixty-nine dollars for advertising land to be sold for the taxes of 1833, the second for the sum of nine dollars for advertising lands for sale for the taxes of 1833.

The defendant objected to the testimony of the witnesses who stated that they had seen the advertisements in the newspaper, on the ground that the paper itself was the best evidence of the fact of the publication and must therefore be produced or its non-production satisfactorily accounted for by proof of its loss or destruction. The court overruled this objection and permitted the testimony to go to the jury. The defendant then requested the court to charge the jury that the defendant was not liable unless it was proven that he had sold the land or that he had received the money or had rendered himself liable for the payment thereof by his neglect. This the court refused to do, but charged the jury that the

defendant was liable for the sum of seventy-five cents for each tract of land which Hall advertised at the request of defendant within three years before the commencement of this suit, unless the defendant had shown them that he offered the lands thus advertised for sale at the time and place appointed by law, that no person would bid the amount of costs and charges due therefor, and that for each tract so proven to be unsold the sheriff would not be liable.

JACKSON,
April, 1839.

Enloe
v
Hall.

The jury rendered a verdict in favor of the plaintiff for the sum of two hundred and seventy-three dollars and fifty-eight cents and costs of suit.

The defendant moved the court to set this verdict aside but the motion did not prevail, and judgment was rendered in conformity with the verdict. The defendant appealed in error to the supreme court.

Fitzgerald, for plaintiff in error. 1. The act of 1805, ch. 50, sec. 2, (1 Scott's Revisal, 872,) declares that the printer shall be paid out of the proceeds of the sale of the land or satisfied by the owner. The act of 1813, ch. 98, sec. 16, makes it the duty of the sheriff to advertise, and fixes the compensation of the printer at seventy-five cents for each tract, to be paid as directed by the act of 1805.

The State, by these acts, proposes a contract to the printer, the terms of which are specified, and when the printer does the work required by these acts, he, by every rule of common reason, would be regarded as having acceded to the terms proposed in the act.

Enloe, being a public officer, and as the agent of the State employed in the collection of the taxes, and in the fulfilment of a public duty, making this contract on behalf of and for the benefit of the State, cannot be held responsible therefor.

Chancellor Kent (in 2 Kent's Commentaries, 632) says, "there is a distinction in the books between public and private agents on the point of personal responsibility. If an agent on behalf of government makes a contract, and describes himself as such, he is not personally responsible even though the terms of the contract might be such as might in a case of a private matter involve him in a personal obligation. In

JACKSON,
April, 1839.

Emloe
v
Hall.

support of which he cites *M^r Beath vs. Haldimand*, 1 Term Rep. 172: *Unwin vs. Wolseley*, 1 Term Rep. 674: *Brown vs. Austin*, 1 Mass. Rep. 208: *Dawes vs. Jackson*, 9 Mass. Rep. 490: *Hodgson vs. Austin*, 1 Cranch, 345: 1 Cond. Rep. S. C. U. S. 329: *Walker vs. Swartwout*, 12 Johnson's Rep. 444: *Rathbone vs. Budlong*, 15 Johnson's Rep. 1: *Adams vs. Whittlesey*, 2 Conn. Rep. 560: *Stinchfield vs. Little*, 1 Greenleaf's Rep. 231. I will add *Jones vs. LaTombe*, 3 Dall. 384: 1 Cond. Rep. 171. The case of *Jones vs. LaTombe* was decided in 1799. LaTombe was the consul general of the French Republic, and drew a bill of exchange on the paymaster general at the national treasury at Paris, styling himself consul; the bill was protested for non-payment, and suit brought against the drawer. The court decided unanimously that as the contract was made on behalf of the government that no action lay. This was going far, as it was sending an American citizen for payment to a foreign government and that government at that time not remarkable for the stability of its institutions.

The case of *Hodgson vs. Dexter* was decided in 1803. Mr. Dexter was Secretary of War on the removal of the federal government from Philadelphia to Washington. Mr. Dexter, as Secretary at War, leased, by covenant, of the plaintiff, buildings for a War Office; they were consumed by fire, and Hodgson, the lessee, brought suit for their value against Dexter. The court here again decided unanimously for the defendant. Chief Justice Marshall, in delivering the opinion of the court, says: "It is too clear to be controverted that where a public agent acts in the line of his duty, and by legal authority, his contracts made on account of the government are public and not personal." He further adds: "a contrary doctrine would be productive of the most injurious consequences to the public as well as to individuals."

The case of *Brown vs. Austin* was decided in 1804. Brown was appointed agent by the House of Representatives of the United States to take testimony touching a contested election for a seat in that House; he summoned Austin as a witness, and this suit was brought for his fees for attending to give his deposition. The court here again unanimously de-

cided that Brown was not personally responsible. Sewall, J. said: "whenever a person acts as agent for the public he is not personally responsible for contracts made by him in that capacity, nor will it make any difference if the services, as in this case, were performed at the special instance and request of the person so acting as agent; for although in common and ordinary cases the law implies a promise and personal obligation as necessarily resulting from services performed on request, yet such implication never arises where it appears that the request was made by a public agent acting in a public concern;" and Dana, Ch. J. said: "but it is said the defendant in error performed the services at the request of Brown, and therefore Brown is personally liable. It is undoubtedly true that in a private individual concern services done upon request are a sufficient consideration. That is not the present case; for although it appears by the declaration that there was a request of Brown, yet it also appears by the record before the court that the services were rendered for the public."

JACKSON,
April, 1839.

Enloe
v
Hall.

The case of *Dawes vs. Jackson* was decided in 1813. Jackson was the superintendent of the Massachusetts State prison, and having authority so to do, contracted to furnish Dawes with a certain number of convicts and certain materials, and Dawes was to superintend their labor and have a share of the profits arising therefrom. The agreement was by indenture of two parties and the action was covenant. Jackson's office of superintendent having expired and another being appointed in his place, he did and could not perform his part of the covenant. The court here again unanimously decided that no action lay against him, but that application for relief should be made to the government.

The case of *Walker vs. Swartwout* was decided in 1815. The defendant was quarter-master general of the army of the United States, and employed the plaintiff to work for the use of the army and promised to pay him; he afterwards refused to give him the voucher necessary to enable him to get his money, but said his word was good. The action was assumpsit, and the court decided that he was not personally responsible.

2. The circuit judge erred in admitting to the jury the

JACKSON,
April, 1839.

Enloe
v
Hall.

statement of witnesses that they had seen the advertisements published in the paper of Hall. This evidence was of a secondary grade. The best evidence was the paper in which the publications were made; and the secondary evidence was not admissible until the destruction or loss of the best was proven, or its non-production satisfactorily accounted for. "This rule is a universal one, applicable as well to criminal as to civil suits." *U. S. vs. Britton*, 2 Mason's C. C. Rep. 404. And where there is better evidence of the fact which is withheld, a presumption arises that the party has some secret and sinister motive for withholding it. *United States vs. Rayburn*, 6 Peters, 352; *Taylor vs. Riggs*, 1 Peters, 596; 1 Starkie, 102. The wisdom of the rule is striking and manifest in this case. The production of the paper would show whether the publication was made in due time and in a proper number so as to authorize the sale of the lands.

A. W. O. Totten, for the defendant in error. This action is brought to recover an account for printing and publishing for the plaintiff in error his tax report for the years 1832, 1833 and 1834. See acts 1819, ch. 53, Hay. and Cobbs, 344; 1813, ch. 98, sec. 16, Hay. and Cobbs, 118.

1. The newspaper containing the publication of the reports was not produced on the trial, but the fact of the publication was proved by witnesses who had seen the advertisements in the paper. The court did not err in receiving this evidence; no higher grade of proof existed to prove the same fact. The newspaper would have been incompetent without the aid of such other proof. The fact to be made out in proof was that the defendant in error had performed the work according to his undertaking; surely such a fact is incapable of proof otherwise than by such evidence. He was not bound to exhibit the work in open court, and it would have been no proof if he had.

2. After the publisher had performed his part of the contract it became the duty of the sheriff to perform his by proceeding to sell the land according to law and paying the printer his fees at the rate prescribed by law. Only one contingency could deprive the printer of his fees, which is, that

the sheriff, having offered the land for sale, could not sell it for the want of bidders; in which case it is his duty to bid it off to the common school commissioners, and the officers then lose their fees. Act of 1829, ch. 54, 2 H. and C. 170. In legal contemplation the sheriff was liable to pay the printer unless he should be relieved from that liability by a condition subsequent, that is, that the land was not sold for the want of bidders. This fact, if it existed, should have been proved by him who was to take advantage under it in his defence, because the fact might be only known to him; and it is a negative contingency that there were no bidders which the law will not presume, but the contrary. The printer is no party to the execution, and therefore could not rule the sheriff to return it, so that he could have the benefit of his return on the trial; but this return of the sheriff is the legal evidence of his proceedings on the execution, and it is in his custody and power and not in the publisher's. The tax report "when received by the sheriff shall be obeyed and returned under the same rules and subject to the same penalties as are now prescribed by law for executing and returning writs of *feri facias*." See act of 1819, ch. 53, sec. 4, H. and C. 344. It also contains within itself a levy on land to satisfy the judgment entered against it. In such case, therefore, the sheriff is subject to the same law that would govern him after the levy of an execution on property sufficient to satisfy a judgment. It is well settled that such a levy is a satisfaction of an execution; it releases the defendant thereto, and charges the sheriff to the amount of the levy. 3 Haywood's Rep. 144: *Young vs. Read*, 3 Yerger's Rep. 298: Bacon's Ab. title "Execution," letter "D:" *Wilbraham vs. Snow*, 2 Saund. Rep. 47, note 1: 2 Saund. Rep. 344.

JACKSON,
April, 1839.

Enloe
v
Hall.

If the sheriff seize goods to the value of the debt he shall answer for such value to the plaintiff, and debt or assumpsit lies against him for the money though the goods have been rescued from him, for he cannot return a rescous. 4 Comyn's Dig. 226, (bottom page and note C:) 1 Salk. 313: Cro. Car. 539: Gilb. Ev. 25: *Clerk vs. Withers*, 3 Ld. Ray. 1075. And so debt lies for an escape. 3 Com. Dig. 367: 2 J. R. 454.

By virtue of the levy the property taken is vested in the

JACKSON,
April, 1839.

Enloe
v
Hall.

sheriff; he shall not deliver it to either party to the execution, and can only discharge himself by a sale of it in satisfaction of the debt. 4 Com. Dig. 225, and page 226, note Z, shows what returns he may make. The sheriff however is not bound to return the execution unless required by one of the parties, (Bingham on Judgments, &c. 189, 251,) for it is said that execution executed is the end of the law. If he make a return it shall be taken as true, but if false in point of fact he is liable for a false return. Watson on Office of Sheriff, 83, 72. If, therefore, the sheriff levy an amount of property sufficient to satisfy an execution, he is *prima facie* bound for the amount of it unless he shall by his return discharge himself from this legal liability, which is a fact to be made out in his defence. He may return that the property remains unsold for want of bidders, and this would release him from his liability; but in the absence of such return the law will presume no such thing, but the contrary. *Hartwell vs. Root*, 19 J. R. 345, shows that the law would presume the sheriff had sold the land.

It has been seen that by the act of 1819 tax sale reports are assimilated to writs of execution, being governed by the same law; they are, in legal contemplation, executions levied, and therefore the principles before referred to have a direct application to them, and they hold the sheriff liable *prima facie* for the amount of tax, costs and charges mentioned in his report or execution, he having it in his power however to discharge himself by his return, showing that he had performed his duty by offering the land for sale but that it did not sell for want of bidders. In such a case the law will presume, in the absence of proof to the contrary, that the defendant received the money for use of plaintiffs. 7 John. Rep. 132: 11 John. Rep. 464: 8 John. Rep. 20: 9 J. R. 96.

GREEN, J. delivered the opinion of the court.

1. As to the first objection taken by the counsel for the plaintiff in error, that the production of the newspaper in which the advertisement was printed ought to have been required by the court, because it was the best evidence of that fact, the court did not err. This case does not fall within

the rule of evidence which the counsel seeks to apply. The work and labor for which this suit is brought was done upon the paper, and the work so done is no more required to be produced in open court than would any other work. As well might the tailor be required to produce the coat or the watch-maker the watch as evidence that the work had been performed.

JACKSON,
April, 1838.

Enloe
v
Hall.

2. But the court erred in instructing the jury that the defendant was liable to pay for advertising every tract which had been published at his request unless he had shown that he offered the lands thus advertised for sale at the time and place appointed by law, and that no person would bid the amount of taxes, costs and charges thereon.

The plaintiff cannot recover upon the special count, because the defendant, as sheriff of Obion county, in the capacity of a public officer, employed him to do the work. It is well settled by many adjudications that if an agent makes a contract on behalf of government he is not personally responsible. See 2 Kent's Commentaries, 632, and authorities there cited.

As the defendant is not liable upon a special contract for the printing the plaintiff can only recover on the count for money had and received to his use, and he must prove that the money was so received. We do not concur with the circuit court in the opinion that the reception of the money is to be inferred from the facts that the land was levied on and advertised. This would require of us to presume two facts: first, that the sheriff did his duty and exposed the land to sale; and second, that they sold for an amount sufficient to pay the taxes, costs and charges. Now, we have no better guarantee for presuming these facts in this case than in any other case where an execution may have come into the hands of the sheriff and a levy on land and an advertisement have been made. In such case, in a suit by the plaintiff in the execution or by any one interested in recovering the costs for money had and received, it would hardly be contended that proof of a levy and advertisement was evidence from which we might presume the land was sold, and that the amount bid was sufficient to satisfy the execution; and yet there is

JACKSON,
April, 1839.
Atkinson
v
Micheaux.

no difference in principle in the two cases. We think, therefore, that the court erred in the instruction to the jury, and that the judgment must be reversed and the cause remanded for another trial.

ATKINSON VS. MICHEAUX.

Where a *ca. sa.* was issued for collection of debt, damages and costs, with the bill of costs endorsed thereon, in which there were abbreviations and lumping charges, the sheriff was bound to execute the writ, notwithstanding such abbreviations and lumping charges.

Where a clerk made a verbal request of an individual to attend to all the duties of his office in his absence, but did not appoint him his deputy, and no oath was administered to such person: Held, that he had no power to administer an oath or issue a *ca. sa.*

Francis Micheaux instituted an action of debt in the circuit court of Fayette county on the 15th day of November, 1836, against N. Atkinson, then sheriff of said county, for an alleged escape permitted by said Atkinson.

The facts of the case are as follows: Micheaux recovered a judgment in the county court of Hardeman county in the year 1834, at the July term of said court, against Charles L. Jeffries, Richard Jeffries, William Shore and Daniel W. Hall for the sum of three thousand nine hundred and fourteen dollars and sixty-five cents debt, and one hundred and eighty-four dollars damages and costs. A *fi. fa.* was issued on the judgment on the 24th day of February, 1835, to the sheriff of Hardeman county, and returned by him endorsed "nothing found." V. D. Barry, the attorney of Micheaux, applied at the office of the clerk of the county court of Hardeman for a writ of *capias ad satisfaciendum* against the defendants. Rufus Neely, the clerk, was absent, but had requested Edward R. Belcher, in his absence, to discharge all the duties of his office. Belcher did not, however, take any oaths or oath of office, gave no bond, and did not regard himself as the deputy of Rufus Neely, yet he had, at the verbal request of Neely, from time to time, in the absence of Neely, done acts in the office of an official character,

which had at all times been recognised by Neely. The debt upon which Micheaux had recovered his judgment above set forth having been contracted subsequent to the act of 1831 abolishing imprisonment for debt except in certain cases, Barry made the following affidavit, which was sworn to and subscribed before Mr. Belcher, and certified by him.

JACKSON,
April, 1839.

Atkinson
v
Micheaux.

"FRANCIS MICHEAUX vs. CHARLES L. JEFFRIES *et als.* V. D. Barry, attorney for the plaintiff, makes oath that he has good reason to believe, and does believe, that Richard Jeffries, one of the defendants, has in his possession or within his control monies sufficient to pay the demand of said plaintiff in this behalf, or a good portion thereof, which he fraudulently withholds from the payment of said debt and therefore prays that a *ca. sa.* may issue in this behalf.

V. D. BARRY, Attorney."

"Subscribed hereunto before me, May 21st, 1836.

R. P. NEELY, Clerk."

Upon this affidavit, Belcher, on the 23d May, 1836, issued a *ca. sa.* in the following words:

"To the sheriff of Fayette county, greeting: You are hereby commanded to take the bodies of Charles L. Jeffries, Richard Jeffries, William Shore and Daniel W. Hall, if to be found in your county, and them safely keep, so that you have their bodies before the justices of our court of pleas and quarter sessions for the county of Hardeman on the first Monday in August next, then and there to satisfy F. Micheaux the sum of four thousand and ninety-nine dollars and fifty-seven cents, debt and damages, and the sum of ten dollars costs, which the said Micheaux hath recovered against said Charles L. Jeffries, Richard Jeffries, William Shore and D. W. Hall, as appears of record July term, 1834, of county court. Witness Rufus P. Neely, clerk of our said court, at office in the town of Bolivar, first Monday in May, 1836. R. P. NEELY, Clerk county court."

In the bill of costs endorsed on this *ca. sa.* there were several abbreviations and lumping charges.

There was on this writ the following endorsement:

"Come to hand the 25th May, 1836; executed on Rich-

JACKSON,
April, 1839

Atkinson
v
Micheaux.

ard Jeffries and Charles L. Jeffries on the 18th day of June, 1836.

NAT. ATKINSON, Sh'ff.

By N. M. WILLIS, Dep. Sh'ff.

Willis, the deputy of Atkinson, took the bonds of said Richard and Charles L. Jeffries, each in the penalty of eight thousand two hundred and nineteen dollars and forty-one cents, for their appearance at the county court of Hardeman, at the court-house in the town of Bolivar, on the first Monday in August, 1836, then and there to take the oath of insolvency, make a surrender of their property, or pay the monies called for in the process. These bonds, together with the writ, were returned by Willis to the clerk of the county court of Hardeman county, and were by the clerk filed and docketed.

At the August term, upon due consideration, the court being of the opinion that the writ and bonds should have been returned to the circuit court of Hardeman, ordered that the cause be stricken from the docket, which was done. Thereupon, Charles and Richard Jeffries went at large.

On the 28th November ensuing Micheaux instituted this action against Atkinson, and at the January term, 1837, by his attorney, Barry, filed his declaration, setting forth the judgment, the issuance of the *ca. sa.*, the arrest and subsequent escape of the defendants, Richard and Chas. L. Jeffries.

The defendant pleaded "*nil debet*," and other pleas, which were demurred to, and which, not being disposed of either in the circuit or supreme court, it is not necessary here to set forth. There was an issue made upon the plea of *nil debet*, and at the May term, 1838, the honorable William R. Harris presiding, by interchange with Judge Barry, the cause was submitted, upon the above facts, to a jury of Fayette.

His honor charged the jury that the clerk of the county court could appoint a deputy by parol, and that such deputy could perform all the duties of the clerk without taking an oath, and that the acts of a deputy so appointed would be good and valid out of term time as well as during the session of the court. The court further charged the jury that where a *capias ad satisfaciendum* issued for debt, damages

and costs, and the bill of costs was endorsed on such writ, but not in words at full length without any abbreviation whatever, such writ of *capias* would not be void in whole or in part, but it would be the duty of the sheriff or other officer to whose hands such *capias* should come to collect the debt and damages and such items of costs as were legally endorsed on the writ, and to refuse to collect such items as were illegally endorsed thereupon. The court further charged the jury that the *capias* in this case was not void; that the officer was bound to execute it, and that he could not enquire whether the affidavit of the plaintiff or his attorney had been made as required by the statute, or whether or not the individual administering the oath upon said affidavit was legally authorized so to do or not; and that if the affidavit was not valid or sufficient the defendant in the execution could take advantage of it, but that the sheriff could not.

JACKSON,
April, 1839.

Atkinson
v
Micheaux.

The jury rendered a verdict for the plaintiff for the sum of four thousand one hundred and nine dollars and seventy-two and a half cents debt, and the further sum of nine hundred and ten dollars and thirteen cents damages, and his costs.

The defendant moved the court to set aside this verdict and award him a new trial upon the ground of mis-direction on the part of his honor to the jury. This motion was overruled and judgment rendered in conformity with the verdict. The defendant appealed therefrom in error to the supreme court at Jackson.

F. P. Stanton, for the plaintiff in error. 1. There are in the bill of costs endorsed on this *ca. sa.* several abbreviations and lumping charges; this renders the process illegal by the express terms of the act of 1796, ch. 7, sec. 9, and the sheriff was not authorized to arrest the defendants by virtue of such process. *Wallen and others vs. M^r Henry's lessee*, 2 Yerger, 310; *Hopkins vs. Waterhouse*, 2 Yerger, 230; *Hopkins vs. Gobeire*, 2 Yerger, 241. These were cases in which costs alone were to be collected by virtue of the executions issued, but the reason of the decisions

JACKSON,
April, 1839.

Atkinson
v
Micheaux.

and the language of the court apply with equal force to a case like the present.

2. Belcher was not a deputy, he had not received an appointment from Neely, nor had he taken any oath of office. This is necessary before he could become a lawful deputy. See act of 1794, ch. 1, sec. 72, Nicholson and Caruthers, 147. The case of *Bonds vs. The State*, M. and Y. 143, cannot be extended beyond the facts of that case. The acts which the court there declared could be done by a clerk appointed by parol were of a ministerial character, and done in the presence and under the supervision of the court; here the act was a judicial act. The statute of 1831, ch. 40, abolishing imprisonment for debt in all except certain specified cases, and requiring an affidavit to be made before the clerk of fraudulent misconduct by the debtor before the *capias* can issue, constitutes the clerk the judge of the sufficiency of the affidavit. The issuance of a *capias* is therefore not a merely ministerial but a judicial act. 14 Johnson, 142. The facts of Bond's case and this are so entirely different that that decision is wholly inapplicable to this case. If this *ca. sa.* be sustained we should see the monstrous anomaly sustained of an officer appointed by parol, and without having taken any oath of office, administering oaths to others and performing judicial acts.

3. No regularly appointed deputy is authorized to administer an oath and issue a *ca. sa.* since the act of 1831, ch. 40; that statute requires an affidavit to be made, and constitutes the clerk the judge of the sufficiency of it. This constitutes the clerk, *quoad hoc*, a judge. Ministerial powers may be delegated; judicial powers cannot be delegated. This proposition is sustained by the action of the legislature. In 1826 that body gave the power to the clerks to grant commissions to take depositions upon affidavit filed; in 1833 they grant the same powers to their lawful deputies. In 1833 they authorize clerks to take the probate of deeds; in 1837-8 they gave the same power to deputies, and legalize their acts previously done. These acts are based upon the supposition that judicial power could not be delegated. The conferring upon a clerk judicial power is a departure

from the original intent and object of the office, and therefore cannot, by any fair rule of construction, be construed to extend beyond the terms of the act.

JACKSON,
April, 1839.
Atkinson
v
Michaux.

4. The act of 1831, ch. 40, is imperative, and negatives absolutely the common law right of imprisoning the body of a debtor except in certain cases and upon the disclosure of certain facts upon affidavit. The statute declares that no *ca. sa.* shall issue without an affidavit, &c. What a statute declares unlawful is void, and if such acts are done they are indictable. 2 Yer. 210.

Barry, for defendant in error. 1. The bond is void, as it should have been taken for their appearance at the next circuit court of the county in which the writ may have been issued. Acts of 1835, ch. 6, sec. 11, C. and N. Dig. 200.

2. If a sheriff allow a prisoner to go at large after his arrest before or after the return of the writ it is an escape. *Watson on Sheriff*, 138; 1 Saund. on Ev. 562; W. Bl. 1049, *Hawkins vs. Plomer*.

3. If a sheriff permit a prisoner to escape he is liable though the judgment on which the *ca. sa.* issued be erroneous or if the *ca. sa.* be erroneous. 5 Law Lib. 100; 2 Saund. R. 101, c; *Jaques vs. Caesar*, Saund. 101, y; 1 Wils. R. 255, *Bell vs. Steward*. As if a *ca. sa.* be issued on a recognizance where by the practice of court it does not lie. 5 Law Lib. 100; 3 Com. Dig. 579.

4. If a sheriff discharge a prisoner by order of a court not having jurisdiction he is liable for an escape. 5 Law Lib. 101; *Watson on Sheriff*, 140; 8 Term R. 424; 9 John. R. 156, *Van Slyck vs. Taylor*; 4 John. R. 115, *Jackson vs. Smith*.

5. The action of debt for an escape is given by statute 13 Edw. I, ch. 11, and 1 Rich. II, ch. 12, which extend to sheriffs. 2 Term R. 132, *Bonafous vs. Walker*.

6. In debt the whole sum for which the defendant was in execution is to be recovered. 5 Law Lib. 103; *Watson on Sheriff*, 143, 150; 6 John. R. 270, *Van Slyck vs. Hoyerboom*, *cum multis aliis*.

7. This action lies against the sheriff, and not the jailer or

JACKSON,
April, 1839.

Atkinson
v
Micheaux.

sheriff's officer. Watson on Sheriff, 33: 8 Term R. 242, *Brown vs. Compton*, and numberless other authorities.

8. The sheriff cannot avail himself of any irregularity in judgment or process. 15 John. R. 155, *Hinman vs. Brees*: 13 John. R. 529, *Scott vs. Shaw*: 15 John. R. 278: 2 Phil. on Ev. 235.

9. The sheriff is answerable *civiliter* for the acts of his deputies. 2 Phil. on Ev. 236: 7 John. R. 36: 2 Nev. and Man. 426, *Smart vs. Hutton*.

10. Whenever the prisoner is in a different custody from that which is likely to enforce the payment of the debt there is an escape. 2 Phil. Ev. 232: 1 Bos. and Pul. 27, *Benton vs. Sutton*.

11. A *ca. sa.* issued without affidavit is not void but voidable. 7 Yer. 436, *Street vs. Vanderpool*.

12. A *ca. sa.* may issue into any county. Bingh. on Jud. and Ex. 255.

13. The authority of a deputy sheriff need not be in writing. Bing. on Jud. and Ex. 223. From which may be inferred that the authority of a deputy clerk need not be in writing. This point, however, I presume, will not admit of argument. No statute requires a deputy clerk to be appointed by record or writing, or to take an oath; and therefore the court will scarcely think any ceremony beyond a parol authority required. *Bonds vs. The State*, M. and Yer. 143.

W. H. Humphreys, for the plaintiff in error.

REESE, J. delivered the opinion of the court.

The question presented by the record is, as to the validity of a writ of *capias ad satisfaciendum* sued out by the attorney of the defendant in error and placed in the hands of the plaintiff or sheriff of Fayette county. The validity of this process has been denied upon various grounds. First: Because the bill of costs annexed to the writ contains several items not written in words at length, but abbreviated; this, it is contended, renders the process void by the express provisions of the act of 1794, ch. 1, sec. 75, and the act of 1794, ch. 2,

sec. 8, and the decisions of this court thereon. 2 Yerger's Reports, 230, 241 and 310. But the sections of the acts referred to, which are identical, relate to the issuance of process for the collection of costs exclusively, and the adjudications referred to were in cases where the process was so issued. We entertain no doubt that where the process issues for the collection of the debt or damages the annexation of the copy of the bill of costs, abbreviated in some or in all the items, should not have the effect to render invalid the process as to the debt or damages, or absolve the sheriff from the duty of making execution thereof, even if in such case he might omit to collect the items of costs improperly abbreviated. Secondly: It is objected to the validity of the *capias ad satisfaciendum* that it was issued by a person who, although in the habit of transacting on behalf of the clerk, and by his request when he happened to be absent, certain business of the office of a merely ministerial character, was not in point of law or fact a deputy clerk, not having taken an oath of office or received an appointment written or verbal from the clerk constituting him a deputy. The record shows the objection to be well taken in point of fact. By the act of 1794, ch. 1, sec. 72, it is required that all deputy clerks shall take the oath appointed for the qualification of public officers and an oath of office. The case referred to in Martin and Yerger's Reports establishes only that it is competent for a person not regularly appointed and qualified as deputy clerk to perform under the eye and superintendence of the court services of a ministerial nature. The legal operation of this state of things is to make invalid the process in the case before us. The act of 1831, ch. 40, sec. 6, prohibits the issuance of such process in general, and permits it only under certain circumstances, to be ascertained and verified by the oath of the party suing out the process. The clerk must not only therefore take the affidavit of the party by administering to him an oath, but he must judge of the conformity of the affidavit with the requirements of the law. The duty therefore is in its nature judicial, and by no means to be performed by the *locum tenens*, from courtesy, of a clerk's of-

JACKSON.
April, 1839.

Atkinson
v
Micheaux.

JACKSON,
April, 1839.

Norment
v
Hull.

fice, himself not sworn; the liberty of the citizen, the policy of the statute, and the general principles of law would be alike violated by the assumption and exercise of such a power. It is not necessary for us to determine whether a deputy clerk, regularly appointed and duly qualified as such, has power to take the affidavit and issue the *capias ad satisfaciendum* provided for in the act of 1831. The question is clear of all difficulty as to one in the situation of the person in the record mentioned as having taken upon himself the duty. He had no such power. The case of *Street vs. Vanderpool*, 8 Yerger, referred to as sustaining the validity of the proceeding in the case before us, is governed by a different principle and is founded upon a state of facts totally different. The circuit court in this case having charged the jury that the law upon the point above discussed was not in conformity with the views which we have here expressed, the judgment must be set aside and a new trial be had, in which the action of the court will be guided by the opinion now given.

NORMENT vs. HULL.

Hull and Norment agreed that for the first year Hull was engaged in the employment of Norment in the erection of a cotton factory Hull should make his wages as low as possible, as Norment was to be at every expense and to receive no profits, and that after the factory went into operation Norment was to pay Hull according to the profits of the establishment: Held, first, that this did not amount to a special agreement, which should have been set forth in the plaintiff's declaration as the measure of his compensation; secondly, that it did not constitute Hull and Norment partners.

Elijah C. Hull instituted an action of assumpsit against Nathaniel E. Norment on the 25th day of January, 1837, in the circuit court of Hardeman county. The declaration of Hull contained two counts: first, that Norment was indebted to him in the sum of one thousand seven hundred dollars for work and labor done, and being so indebted, in consideration thereof promised to pay him such sum when he should be requested: secondly, that Hull had bestowed care and diligence in and about the business of Norment, and had done work and

labor for him, all at the instance of Norment, and that in consideration of such labor, care and diligence, Norment agreed to pay him so much as such work and labor, care and diligence were worth, when requested, and that such care and diligence, work and labor were reasonably worth the sum of one thousand seven hundred dollars.

JACKSON,
April, 1839.

Norment
v
Hull

The defendant pleaded non-assumpsit, and issue was joined.

The cause came on to be tried before judge Read at the July term, 1838, and was submitted to the jury upon the proof. It appears that Norment, in the year 1833, determined to put into operation, in the county of Hardeman, a cotton spinning factory, and that he, for this purpose, engaged the services of plaintiff, Hull, a cabinet workman. Hull went to the State of Kentucky for the purpose of purchasing the machinery, and also for the purpose of acquiring information in regard to the manner of putting the factory in operation and of conducting and managing it most successfully. Norment paid his expenses; Hull purchased the machinery, brought it to Hardeman county, and superintended the erection of the factory house, the putting into operation of the machinery, and conducted the establishment. He was engaged in this business from April, 1833, till about the month of November, 1836. Norment furnished the capital employed, the hands engaged, the materials, timber, tools, and boarded Hull a portion of the time. The erection of the establishment cost about seven thousand dollars, and it does not appear that much profit, if any, was realized from the business during the time Hull was engaged. The machinery got out of order, and Norment was forced to send to Kentucky for the purpose of getting a workman to put it in repair, who stated that it was much injured for the want of a competent superintendent. There was testimony given in tending to show that Hull was incompetent to the task he had undertaken. The machinery was loosely put together, and the amount of cotton spun was not equal, in proportion to the spindles running, to the product of other factories, though the thread was well spun.

It appeared that the wages of a competent superintendent of a cotton factory of the size of the one in question was

JACKSON,
April, 1839.

Norment
v
Hull.

from one dollar and a half to two dollars per day, and higher. There was much testimony not necessary to be set out: only two witnesses spoke of the terms upon which Hull was engaged by Norment. Hull left Norment's employment and called for a settlement; in reference to which a conversation took place which was detailed by the witnesses. They stated that Norment asked Hull if he had determined what he should charge him. Hull answered that he had not. Norment then asked Hull if it was not their contract that for the first year Hull should make his wages as low as possible, as he (Norment) was at every expense and received no profit during that year, and that after the factory went into operation Norment was to pay him according to the profits of the establishment? Hull agreed that such was the contract. Hull then proposed that Norment should pay him one dollar per day during the time he was engaged in constructing and superintending the factory. Norment having made a calculation, assented to the offer with some apparent reluctance, upon which Hull receded from his proposition except as to the first year, and claimed five hundred dollars per year for the balance of the time. This ended the conversation upon the subject.

The court charged the jury that the plaintiff must recover, if at all, on the *quantum meruit* count; that the contract proved by the witnesses was, that for the first year the plaintiff was to make his wages as low as possible, and that after the factory went into operation his wages should be increased in proportion as the profits of the establishment would justify; that this contract contemplated that the plaintiff was to have low wages under any circumstances, and that they should, without taking into consideration the profits of the establishment the balance of the time, enquire what was a reasonable compensation for his services the balance of the time. The court further charged the jury that if plaintiff reported himself competent to superintend the establishment and proved incompetent, yet, unless he thereby deceived and defrauded the defendant, the defendant must take the consequences.

The defendant's counsel requested the court to charge the

jury that unless the proof showed them what proportion of the profits plaintiff was to receive according to the contract, they could not find for him. This the court refused to do, and charged the jury that they should allow the plaintiff a reasonable compensation without regard to the profits. The jury rendered a verdict for the plaintiff for the sum of three hundred and thirty-eight dollars for the first year, and at the rate of five hundred dollars per annum for the balance of the time, allowing the defendant a credit of six hundred and eighty-six dollars paid to the plaintiff.

The defendant, by counsel, moved the court to set this verdict aside. The motion was overruled. Motion was made in arrest of judgment and overruled, and the defendant appealed in error to this court.

McClanahan and Brown, for plaintiff in error.

Bailey, for defendant in error.

REESE, J. delivered the opinion of the court.

The question for our decision arises upon the effect of the evidence given on the trial of the cause by two of the witnesses for the defendant in the court below, and upon the charge of the court as to that evidence. The testimony of both these witnesses was in substance that the defendant, Normont, asked plaintiff if he had determined what he would charge him for his services, who replied in the negative. The defendant asked the plaintiff if it was not their contract that for the first year the plaintiff should make his wages as low as possible, seeing that defendant was at every expense and received no profit during that year, and that after the factory went into operation the defendant was to pay the plaintiff according to the profits; that to this statement the plaintiff assented. The plaintiff then proposed that he should be paid a dollar per day during the time he had been engaged in constructing and superintending the factory. Defendant having made a calculation of the amount, assented to the offer with apparent reluctance; upon which plaintiff receded from his offer except as to the first year of his services, and claimed five hundred dollars a year for the balance of the

JACKSON,
April, 1839.

Normont
v
Hull.

JACKSON,
April, 1839.

Norment
v
Hull.

time during which he continued in the service of the defendant.

As to the effect of the testimony quoted above, it is insisted here for the benefit of the defendant in the court below: first, that it constituted plaintiff and defendant partners in the factory to be built, the one contributing capital, the other labor and skill; secondly, or at the least, that it amounted to a special contract and agreement, which should have been set forth in the declaration as the ground of the plaintiff's action, who should not have been permitted to recover upon the common count for a *quantum meruit*.

As to the first position: that the plaintiff was the hiring and not the partner of the defendant, is apparent from the conversation of the parties, as proved by those two witnesses, and from all the testimony in the cause. As to the second position, that the agreement was special, we are of opinion that the conversation of the parties, as proved by those two witnesses, does not establish a special agreement. His wages were to be as low as possible for the first year, and after that according to the profits, that is, considering that during the first year, by the increasing expenses without the reception of profit, the means of the defendant would be limited, he would expect the plaintiff to be low in his charges, and after that the plaintiff might expect his liberality to increase as the reception of profit might improve his means. Here is no special or fixed or ascertainable rate of compensation. How low are the wages to be for the first year? So low as the plaintiff can reasonably afford to work. How high afterwards? So high as the plaintiff can reasonably afford to pay. How low would the circumstances of the plaintiff justify him in working? How high would those of the defendant justify him in paying? It is obvious that these constitute proper subjects of inquiry for the jury. The conversation proved, therefore, does not amount to a special agreement, but was only an inducement to the agreement. The legal rule, therefore, and the only one under the circumstances controlling the measure of the plaintiff's compensation, is that which, in the absence of a special agreement, directs that for his work and labor he shall receive what, from

its nature and value, he reasonably merits. It is obvious, in this view of the case, that the error of the circuit judge, if any, in the statement of the proof and in the rule of compensation by him deduced from it, was an error of which the plaintiff below might complain, but of which the plaintiff here cannot. The rule prescribed by the circuit court to the jury, that from the contract proved, the plaintiff would be entitled to low wages during the first year, and to reasonable wages afterwards, cannot be complained of by the defendant below, either as to the assumption of fact upon which the rule was based or as to the rule itself. Of both, perhaps, the plaintiff below might have complained, for the evidence would have authorized a verdict for a larger amount.

Let the judgment be affirmed.

JACKSON,
April, 1838.
Pipkin
v
James.

PIPKIN vs. JAMES.

Oliver and Pipkin bought of James some groceries, an ice-house and lot; Neily made a memorandum of the sale headed, "Invoice of articles purchased by Pipkin and Oliver of James 20th August, 1836." One of the items of sale was stated thus: "one ice-house and lot, \$140:" Held, that this contract as to the ice-house and lot was void by statute of frauds by reason of its uncertainty.

Where A sells real estate without title at the time of sale, the contract is a nullity, and the vendor may recover the purchase money paid under such contract.

Shadrach Pipkin instituted this action of assumpsit against William R. James on the 20th September, 1838, in the circuit court of Hardeman county, to recover the consideration money which he had paid for an ice-house and lot in the town of Bolivar. It was tried at the March term, 1839, on the plea of non-assumpsit, before Judge Barry, and a verdict and judgment rendered for the defendant. The plaintiff appealed in error to this court. The facts are fully set forth in the opinion of the court.

W. C. Dunlap, for plaintiff.

D. Fentress, for defendant.

JACKSON,
April, 1839.

TURLEY, J. delivered the opinion of the court.

Pipkin
v
James.

This is an action brought by the plaintiff to recover a sum of money paid as the consideration of the purchase of an ice-house and lot, upon two grounds: First, that the contract is void by the operation of the statute of frauds and perjuries; second, that the defendant had not, at the time of the sale, nor yet has, any title to the property sold.

It appears from the proof that the plaintiff and one R. Oliver had purchased from the defendant a quantity of groceries and an ice-house and lot, and that R. P. Neily, at the request of both parties, made out an invoice or memorandum of the different articles, which was headed with the following words: "Invoice of articles purchased by S. Pipkin and R. Oliver of Wm. R. James, this 29th August, 1836." After enumerating a variety of articles, the concluding item in the invoice is in the words and figures following: "One ice-house and lot, \$140." This is the only note or memorandum of the contract signed, either by the parties or any other person authorized by them. A few days after this contract was made R. Oliver became dissatisfied with it, and Isaiah Flinn agreed to take his place, and the notes of Pipkin and Flinn were executed to the defendant for the purchase money, which were paid before the commencement of this action. It also appears from the proof that the defendant had not at the time of the contract, or at the commencement of this suit, any title whatever to the lot of ground upon which the ice-house was built, and had refused to give any bond binding himself to convey the same to the plaintiff. Upon this state of facts, the two questions are presented for the consideration of the court. First, is the contract for the purchase of the ice-house and lot void by the operation of the statute of frauds and perjuries? We think it is. The statute provides that no action shall be brought upon any contract for the sale of lands, tenements or hereditaments, or in the making any lease thereof for a longer term than one year, unless the promise or agreement upon which said action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person by

JACKSON,
April, 1839.Pipkin
v
James.

him thereunto lawfully authorized. It is contended for the defendant, that the entry made at the request of the parties in the inventory of articles bought by the plaintiff is such a note or memorandum of the contract as is required by the statute. We do not think so; because, in the first place, it is proven that the inventory was not intended by the parties as a note or memorandum of the contract, but merely as a statement of the amount of the different articles purchased, with the view of ascertaining the aggregate sum for which the notes were to be executed; and because, secondly, if it were intended as a note or memorandum of the contract it is void for uncertainty, both as to the terms of the contract and the description of the property. "The note or writing must specify the terms of the agreement; for otherwise all the danger of perjury which the statute intended to guard against would be let in." Sugden on Vendors, 89.

A writing acknowledging the reception of a sum of money, being the cash part of the consideration on a sale of land to the plaintiff, without saying more, is not such memorandum as will take the case out of the statute of frauds and perjuries. 4 Bibb, 566.

"A memorandum of the sale of lands to be effectual must not only be signed by the party to be charged but must contain the substantial terms of the contract in itself, or in some other writing to which it refers." Johnson's Ch. Rep. 273: 14 Johnson's Rep. 15: 2 Wheat. 336-341.

An entry by an auctioneer in his books, stating the name of the owner, the person to whom the estate is sold and the price it sold for, is a sufficient memorandum of an agreement to satisfy the statute, provided it contains the conditions of the sale and the particulars of the property, or refers to them so as to enable the court to look at them; otherwise clearly not. Sugden on Vendors, 95: 7 East, 558: 2 Barn. and Cress. 845. The authorities are conclusive upon the question. The terms of the entry in the inventory in this case are: "Bought of Wm. R. James an ice-house and lot, \$140. Here is nothing with regard to the condition of the sale, the particulars of the property, nor any such description of it as would authorize a resort to parol proof for its identification. The contract then would

JACKSON,
April, 1839.

Pipkin
v
James.

be void for uncertainty in its terms and in the description of the property sold even if the entry in the inventory could be considered as a note or memorandum thereof within the operation of the statute of frauds and perjuries.

2. Is the plaintiff entitled to maintain this action because the defendant has no title to the premises intended to be sold? We think he is. It is unnecessary to enter into an investigation of the principles upon which the truth of this proposition depends. They are too obvious to require examination. Sugden, in his Treatise on Vendors, page 287, says: "When a person sells an interest, and it appears that the interest which he pretends to sell was not the true one, as, for example, if it was for a less number of years than he had contracted to sell, the purchaser may consider the contract at an end and bring an action for money had and received to recover any sum of money which he may have paid in part performance of the agreement for sale;" for which he cites the cases of *Turner vs. Nightingale*, 2 Esp. Ca. 639; *Hearn vs. Tomlin*, Peak's Ca. 192; *Thompson vs. Miles*, 1 Esp. Ca. 184, and others. If this may be done in cases where the vendor has a title, but not such an one as he contracted to sell, *a fortiori*, may it be done where he has no title at all. In the case of *Dearen vs. Bartley*, 1 Cains' Rep. 47, it was held that the purchaser might maintain assumpsit to recover back the purchase money, although the contract was under seal. Upon this subject see also 1 Dall. 228; 5 John. 85; 11 Johnson, 527; 12 Johnson, 274; 10 Johnson, 73; 4 Conn. 330. In the case of *Tendring vs. London*, 2 Eq. Cas. Ab. 680, it is held, that where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor has it in his power by the ordinary course of law or equity to make himself so, though the owner offer to make the seller a title, yet equity will not force the buyer to take; for any seller ought to be a *bona fide* contractor, and it would lead to infinite mischief if an owner were permitted to speculate upon the sale of another's estate. To the same purpose is 10 Ves. 315, and 1 Jac. and Wal. 431. Besides, as is observed by Sugden, 208, in his Treatise on Vendors, the remedy is not mutual, which is, of itself, a sufficient objection in a case

of this nature, as has been held by this court at its present term in the case of *Jenkins vs. Atkins*. Then upon both points the court below erred. The case will therefore be reversed and remanded for further proceedings.

JACKSON,
April, 1839.

Cochran
v
Brown:

COCHRAN vs. BROWN and CREWS.

A non-suit, though set aside at the same term at which it is taken, operates as a discharge of the witnesses in attendance.

On the 5th day of June, 1837, a subpoena issued from the office of the clerk of the circuit court of Hardeman county to the sheriff thereof, commanding him to summon Henry W. Brown and Joseph Crews to appear forthwith before the judge of the circuit court, then sitting in Bolivar, to testify in favor of Elizabeth Cochran, in a cause therein depending wherein the said Elizabeth was plaintiff and William Hester was defendant, under the penalty of one hundred and twenty-five dollars in case of failure so to appear. This writ was executed on the same day and returned. At the same term, on the 12th June, the cause was called for trial, and the plaintiff took a non-suit, and the same was accordingly entered. On a subsequent day of the term, V. D. Barry, presiding judge, upon the affidavit of plaintiff, set aside this non-suit, reinstated the cause, and continued it till the October term. At the October term it was again continued, and at the February term, 1838, the cause was called for trial, and Brown and Crews being called, and not appearing, a judgment *nisi* was entered against them for the sum of one hundred and twenty-five dollars, and *scire facias* ordered to issue against them, summoning them to appear at the next term and show cause why, &c. &c.

This writ was served upon Brown and Crews; and at the November term the defendants, by their attorney, Fentress, pleaded, "that after they were served with the subpoena, and before they were called to testify and give evidence in said suit of Elizabeth Cochran against William Hester, in behalf of said Elizabeth Cochran, as set out in said *scire fa-*

JACKSON,
April, 1839.

Cochran
v
Brown.

cias, the said plaintiff took a non-suit in her said suit against said Hester, as set out in said *scire facias*, and thereby the said suit of E. Cochran against William Hester was ended and determined, and that they were no longer bound to attend as witnesses."

To this plea the plaintiff, by her attorney, replied that she ought not to be barred of her action against the defendants by reason of the allegations of the plea because "the non-suit set forth in the plea was, during the same day and term of the court at which it was taken, set aside by order of the court."

The defendants demurred to this replication, and the plaintiff joined in demurrer.

The cause came on for argument at March term, 1839, and being argued, the presiding judge, Barry, sustained the demurrer to the plaintiff's replication, and gave judgment in favor of the defendants. From this judgment the plaintiff appealed in error to this court.

Bailey, for plaintiff in error.

Fentress, for defendants.

GREEN, J. delivered the opinion of the court.

The question made by the pleadings in this case is, whether a non-suit entered in a cause discharges witnesses who may have been summoned, so that if it be set aside they are not bound to attend unless re-summoned. It is contended by the plaintiff in error that a non-suit does not discharge a witness within the meaning of the act of 1794, ch. 1, sec. 29. That act says, a witness, when once summoned, shall attend from term to term until discharged by the court or the party at whose instance he was summoned. The act cannot mean that there must be a formal order of the court discharging the witnesses. In practice that never is made, and it would be thought absurd by every one for the witnesses to apply for a discharge after the cause had been determined and ended. The true construction of the act is, that wherever a final judgment is given which determines the cause the witnesses are thereby discharged by the court. If this be not so, and the setting aside a non-suit or granting a new trial

would continue the obligation on the part of the witnesses to attend, the greatest loss and inconvenience both to parties and witnesses would be the result. Sometimes a motion for a new trial is continued from term to term before it is decided. Must the witnesses attend all this time, and thus add greatly to the costs of the suit, when possibly the new trial may be refused and all the costs to the party and trouble to the witnesses will have been produced for no benefit? Would it not be much better that the parties should be put to the trouble of summoning their witnesses again should a new trial be granted?

JACKSON,
April, 1839.

Cochran
v
Brown.

If the principle contended for be correct, it is not perceived why it may not apply to a case which may have been decided below and taken to this court, reversed and remanded for another trial. But to require witnesses to attend the circuit court until the cause should be thus remanded would be too preposterous for any person to contend for. The safe construction of the act, therefore, is that which we have indicated. A non-suit is a final disposition of a cause as completely as a judgment on a verdict. After the non-suit was taken the defendants had a right to consider themselves discharged by the court. Let the judgment be affirmed.

JACKSON,
April, 1839.

AGEE vs. DEMENT.

Agee
v
Dement.

Where a court or justice has no jurisdiction of the subject matter in dispute, such want of jurisdiction cannot be waived by appearance, plea, consent, or in any way whatever, and any judgment rendered in such case must be void to all intents and purposes.

Where a court or justice has jurisdiction of the subject matter, but not of the person, such want of jurisdiction of the person may be waived by consent, or by plea to the merits, and cannot afterwards be asserted.

Where a warrant was returned for trial before a justice legally competent to try such warrant, and such justice transferred it to the jurisdiction of another justice: Held, that such transfer, without the consent of plaintiff and defendant, was illegal, yet if the party, plaintiff or defendant objecting thereto, did not plead in abatement, but pleaded to the merits, it amounted to a waiver, and the judgment rendered by such justice would be valid.

Catherine Dement sued out a warrant on the 13th day of June, 1838, under the hand of Rufus F. Boyd, a justice of the peace for Gibson county, against John D. Agee, in trespass, for taking and converting to his own use two head of cattle, the property of the plaintiff, to her damage fifty dollars. This warrant was executed on Agee, and defendant notified to appear before H. Harrison, on the 27th June, 1838. On the 27th the defendant continued the cause by affidavit until the 13th July ensuing, then to be tried by Harrison and by Randal, who was invited to sit with Harrison.

On the back of the warrant are the following endorsements:

"Continued, on the affidavit of the plaintiff, to Trenton, before Esq. Davidson, on the 20th July, 1838, this 13th July, 1838.

J. RANDAL, J. P.

H. HARRISON, J. P."

"July 20th, 1838. Judgment for defendant for costs of suit.

A. S. DAVIDSON, J. P."

"From the above judgment the defendant prays an appeal to the next circuit court, and having given bond, &c. the same is granted.

A. S. DAVIDSON, J. P."

It does not appear that Agee either assented or objected to the transfer of the cause to be tried by Davidson, or that he urged before Davidson his want of jurisdiction over his person.

At the November term, 1838, of the circuit court of Gib-

son county the cause was tried before judge Harris and a jury of Gibson upon the merits of the case, and a verdict rendered for the plaintiff for the sum of twenty-three dollars and costs of suit. The defendant moved the court to set this verdict aside, but the motion was overruled. A motion was also made in arrest of judgment. This motion was also overruled, and a judgment rendered upon the verdict. There is a bill of exceptions in the record setting forth the evidence and the particulars of the trial, but it does not appear that the defendant did or did not put in a plea in abatement in the circuit court or before the magistrate, or in any manner objected to a trial upon the merits of the cause.

JACKSON,
April, 1839.

Ague
v
Dement.

The defendant appealed in error to the supreme court.

Raines, for plaintiff in error.

Parker, for defendant in error.

TURLEY, J. delivered the opinion of the court.

The principal question presented for the consideration of this court in this case arises upon the motion in arrest of judgment, and is, whether the circuit court had jurisdiction of the cause?

That the court had jurisdiction of the subject matter in dispute is not denied; but it is contended that it had not jurisdiction of the person of the plaintiff in error, and that therefore the judgment is void, and must be arrested. The want of jurisdiction in a court of the subject matter in dispute cannot be cured by appearance, by plea, by consent, or in any other way whatever; but the judgment is and must remain to all intents and purposes absolutely null and void. But it is not so in the case of a want of jurisdiction of the person. This is a personal privilege, and if the party seeks to avail himself of it, he must do it, if he appear, by plea in abatement; for if he enters an appearance and suffers a judgment by default, or if he plead to the merits of the case and go to trial, he has waived his privilege, and shall not be permitted afterwards to assert it.

To apply these principles to the present case. The warrant was returned before H. Harrison, Esq., and was by him

JACKSON,
April, 1839.

Agos
v
Dement.

and J. Randal, Esq., whom he had called to preside with him, transferred for final trial to the jurisdiction of A. S. Davidson, Esq. a justice of the peace for the same county. That there is no law warranting this mode of proceeding is unquestionably true. A. S. Davidson gave judgment for the defendant, from which the defendant appealed to the circuit court.

Whether the defendant was before the justice litigating his rights does not appear. If he was, and did not insist on his personal privilege, to wit, the want of jurisdiction of his person by the justice, in consequence of the irregularity of the proceeding, as matter in abatement, but defended his case upon its merits, he gave the justice jurisdiction of his person. When the cause was removed to the circuit court he was in the same position, if he had not given jurisdiction of his person to the justice by an appearance and defence of his case upon its merits. Inasmuch as the circuit court had jurisdiction of the subject matter of the suit he was bound by the law to insist upon his personal privilege as a matter in abatement before he defended his case upon its merits. This he omitted to do. It is then too late to seek protection from it now. Let the judgment therefore be affirmed.

JONES vs. READ.

JACKSON,
April, 1835.Jones
v
Read.

Where a security obtains judgment against his principal by motion, such judgment must recite upon its face and assume the existence of all facts necessary to give the court jurisdiction, or it will be void.

Where a judgment by motion was obtained by security against his principal which did not recite that a judgment had been previously obtained by the creditor against the security: Held, that such judgment was void for the want of such recital.

Where a judgment was obtained against several sureties, no one of them has the right to a separate judgment till he has paid the said judgment, or a portion thereof, and any judgment which he may so obtain, not reciting the payment of the judgment or some portion thereof, is void; though all the sureties are entitled to a joint judgment upon the rendition of the judgment against them.

Where a judgment by motion of surety against his principal showed that more than three years had elapsed from the time of paying the money till the making of the motion: Held, that where a bill was filed to subject real estate to the satisfaction of such judgment, such objection did not render invalid the judgment, and could only have been used as a defence, if at all, to the original motion, or by writ of error to a superior court, or writ of error *coram nobis*.

Where there were various considerations set forth in a deed of conveyance, and such deed of conveyance is attacked for fraud by creditors: Held, that the failure to prove such considerations furnishes indications of fraud.

Jones paid money under a judgment obtained against him as the surety of Read in 1824; he obtained judgment by motion against Read in 1832, and filed his bill to subject real estate to sale for the satisfaction of such judgment: Held, that the statute of limitations commenced running in favor of a fraudulent vendee and against Jones from the date of his judgment by motion and not from the time of the payment of the money.

This bill was filed on the 3d day of October, 1835, in the chancery court at Bolivar, by Edward D. Jones, a citizen of Giles county, against James Read and Alexander Read, citizens of the State of Mississippi, to subject a tract of land, lying in Fayette county, to sale for the satisfaction of certain judgments recovered by Jones against James Read in the county of Giles.

James Read departed from Giles county about the year 1824, and left the State, leaving Edward D. Jones liable for him in various cases as special bail, as surety on notes and as stay. In 1826 or 1827, he came to the county of Fayette, in

JACKSON,
April, 1839:

← Jones
v.
Read.

this State, and took possession of a tract of land called the "John Long tract," containing one thousand and ninety-seven acres. He had acquired the equitable title to said land. On the 6th day of February, 1827, James Read conveyed the whole tract to Dr. Thos. Hunt, and took his bond to re-convey some six hundred and ninety acres thereof to Alexander Read, his son, and put Alexander Read in possession, which said Alexander continued to hold till the filing of this bill. On the 11th of December, 1827, this contract was changed and the following arrangement made: Hunt took James Read's deed for four hundred and fifty acres of the land and executed his note to him for the sum of one thousand eight hundred dollars, and gave a bond to convey the balance to Alexander Read. At the time of the execution of this contract James Read gave as a reason for the manner in which the affair had been transacted that there were some old debts which he wished to avoid. On the 3d day of March, 1831, James Read executed to Alexander Read, his son, a deed, with covenants of general warranty, for the whole tract, acknowledging the receipt of the following considerations:

1. James Read's note to Woods, due July, 1821, principal two hundred and sixty-one dollars, interest one hundred and fifty-seven dollars.

2. James Read's note to his son for John three hundred dollars, due January, 1825, interest one hundred and twenty-eight dollars.

3. James Read's notes, three in number for fifty dollars each, to Phil. Clark, interest sixty dollars.

4. James Read's notes, three in number, to James B. Craighead, for fifty dollars each, interest sixty-three dollars.

5. James Read's note to Smith for twenty dollars, interest four dollars and fourteen cents.

6. James Read's note to D. Fentress for twenty dollars, interest four dollars and eighty cents.

7. James Read's note to Hatly for twenty dollars, interest four dollars and forty cents.

8. For two years' services after said Alexander came of age, two hundred dollars.

9. For seven years maintenance of himself, his wife and

grand-child, and furnishing him with a riding-horse at the reduced price of three hundred dollars per annum, making in all the sum of three thousand six hundred and forty-nine dollars thirty-four cents.

JACKSON,
April, 1839.

Jones
v
Read.

This deed specified that if the suit which Jas. Read had instituted for the recovery of the legal title for the said land against John Long's heirs, and which was then pending in the chancery court at Bolivar, should be terminated in his favor, that then and in that event the whole title to said land should be vested in said Alexander Read. It does not appear that any considerable portion of said alleged debts were discharged by said Alexander, or that any assumption of them or other attempt at the settlement of them had been made; nor was there any proof as to the alleged services and maintenance of the family of the vendor of the land.

On the 5th of the same month Hunt executed a quit-claim deed to Alexander Read and took up the bond which he had executed to him. J. Read subsequently recovered the whole tract in the supreme court.

On the 30th November, 1832, Jones recovered a judgment against J. Read in the county court of Giles in the following words, to wit:

No 1. "This day came the plaintiff by W. C. Flurnoy, his attorney, and moved the court, now here, for judgment against the defendant for the sum of four hundred and eighty dollars and fifty cents, that sum being the amount of principal, interest and costs of a judgment which John McAnnally recovered in the circuit court of Giles county on the 11th day of August, 1825, upon an appeal on a *scire facias* against the plaintiff and Henry M. Newland, as appearance bail for said James Read; and it appearing to the satisfaction of the court that the plaintiff did on the 7th day of February, 1826, pay, as such security, to Lewis H. Brown, then sheriff of Giles county, the sum of three hundred and forty-two dollars and thirty-four cents, the amount of principal, interest and costs up to that time of an execution which issued from said circuit court upon the judgment on the appeal aforesaid, it is therefore considered by the court that the plaintiff recover of said defendant the sum of three hundred and forty-two

JACKSON,
April, 1839.

Jones
v
Read.

dollars and thirty-four cents, together with interest thereon at the rate of six per centum per annum from the said 7th day of February, 1826, until this time, which is one hundred and thirty-eight dollars and sixteen cents, making in the aggregate the sum of four hundred and eighty dollars and fifty cents and his costs by him about his suit in this behalf expended."

On the 31st of May, 1833, complainant recovered against said Read a judgment in the county court of Giles in the following words:

No. 2. "This day came the plaintiff by Field and Topp, his attorneys, and moved the court, now here, for judgment against the defendant for the sum of twenty-five dollars, with interest thereon from the first day of August, 1824, which he on that day paid as the security of said defendant on a note executed by said plaintiff and said defendant to Lunsford M. Bramlett; and it not appearing from the face of the note whether the plaintiff was principal or security therein, a jury was empannelled to try that fact, to wit, Jesse Haskens, &c. who being sworn well and truly to enquire as aforesaid, upon their oaths do say that the plaintiff was the security of said defendant: it is therefore considered by the court that the plaintiff recover of said defendant the sum of twenty-five dollars, with interest thereon from the aforesaid first day of August, 1824, till this time, which is thirteen dollars and twelve and a half cents, making in the whole the sum of thirty-eight dollars and twelve and a half cents, together with the costs of this motion."

On the same day he recovered against him in the same court a judgment in the following words, to wit:

No. 3. "This day came the plaintiff by his attorneys, Topp and Field, and moved the court for judgment against the defendant for the sum of four hundred and seventy-six dollars and fifty-seven cents, with interest thereon from the 24th of July, 1824, which on that day he paid as the security of said defendant on an execution which issued on a judgment which Parks Baily recovered against said plaintiff and James Rainy, William Ball and Henry M. Newland, in the circuit court of Giles county on the 16th day of August, 1823,

for the sum of eight hundred and forty-seven dollars and fifty cents and costs; and it appearing to the satisfaction of the court, on the inspection of the record, that said judgment was rendered against said plaintiff and Jas. Rainy, William Ball and Henry M. Newland in consequence of their undertaking as special bail for said defendant, it is therefore considered by the court that the plaintiff recover of the defendant the sum of four hundred and seventy-six dollars and fifty cents, with interest thereupon from the 24th day of July, 1824, till this time, which is two hundred and forty dollars and fifteen cents, making in the whole the sum of seven hundred and sixteen dollars and seventy-two cents, together with the costs of this motion."

JACKSON,
April, 1839.

Jones
v
Read.

On the 28th day of February, 1828, in the county court of Giles county, complainant recovered against said Read a judgment in the following words:

No. 4. "This the 28th of February, 1828, came the plaintiff by his attorney, W. C. Flurnoy, and moved the court for judgment against the defendant for the sum of nineteen dollars and ninety-six cents, with interest thereupon from the 1st day of February, 1827, which he on that day paid as the security of said defendant, it being one-half the amount of an execution which issued on a judgment which Parks Bailly recovered against said James Read, Henry M. Newland and Edward D. Jones, his securities, in the circuit court of Giles county; and the court being fully satisfied, from an inspection of the record, that said plaintiff paid said sum of money as the security of said defendant, it is therefore considered by the court that the plaintiff recover of the defendant the aforesaid sum of nineteen dollars and ninety-six cents, with legal interest thereupon from the first day of February, 1827, till paid, together with the costs of this motion. No execution having been issued on this judgment for more than a year and a day it was revived by *scire facias* on the 27th February, 1834."

On the 1st day of June, 1833, in the county court of Giles county, complainant recovered judgment against the defendant in the following words:

No. 5. "This day came the plaintiff by Flurnoy and Riv-

*JACKSON,
April, 1839.

Jones
v
Read.

ers, his attorneys, and moved the court for judgment against the defendant for the sum of twenty-five dollars, with interest from the 3d August, 1824, which plaintiff on that day paid as the security of said defendant to Daniel Puryer, then a constable of Giles, on a judgment rendered by Thomas Marks, a justice of the peace for Giles county, against said defendant, and plaintiff as his security; also for the sum of thirty dollars and fifty cents, with interest from the 7th day of May, 1824, which he on that day paid for said defendant to Thomas B. Haynie, then a constable of Giles county, on a judgment that William Ball recovered against James Read on the 18th November, 1823, and which was stayed by said plaintiff; and it appearing to the satisfaction of the court, upon the inspection of the receipts of said Daniel Puryer and Thomas B. Haynie, then constables as aforesaid, that said plaintiff was the security and stay of said defendant, it is therefore considered by the court that plaintiff recover of said defendant the sum of twenty-five dollars, with interest from the 3d day of August, 1824, till this time, which is thirteen dollars and twelve and a half cents, and also the sum of thirty dollars and fifty cents, with interest from the 7th day of May, 1824, till this time, which is seventeen dollars and thirty-eight cents, making in the whole the sum of eighty-six dollars and one half cent, together with the cost of this motion."

These judgments remained unreversed and unsatisfied, and after the issuance of various writs thereupon, the land in controversy was levied on, and sold on the 17th of February, 1834, by Joel L. Jones, the sheriff of Fayette county, to Edward Jones, for the sum of forty-three dollars, by virtue of writs of *venditioni exponas* issued upon judgments Nos. 1, 2, 3 and 5. It was also exposed to sale on a writ of *venditioni exponas* on the 18th December, 1834, on judgment No. 4, and sold to Jones for the sum of ten dollars and ninety-seven cents.

On the 3d of October, 1835, Jones filed his bill setting forth his judgments against James Read, and charging that the pretended title of Alexander was made in fraud of cred-

itors, and praying that it might be declared void, and that the land be sold for the satisfaction of the judgments.

JACKSON, 9
April, 1839.

James and Alexander Read filed their answer, in which they alleged ignorance of the joint claims and judgments of Jones, and prayed for proof thereof, and denied all fraud in the conveyance of the property to Alexander Read. To this answer a replication was filed by complainant.

Jones
v
Read.

The cause came on for final hearing at the November term, 1838, before chancellor Brown, who declared the deed of the 5th of March, 1831, from James Read to his son Alexander, made in fraud of creditors and void, and that complainant's judgments Nos. 1, 3 and 4, be satisfied by the sale of so much of said land conveyed to James Read as was necessary for that purpose, and that the clerk and master take an account of the amount due Jones from Read on said judgments with interest and costs. The clerk reported the aggregate amount due to be one thousand five hundred and ninety-four dollars seventy-four and a half cents, and costs fourteen dollars. The chancellor confirmed this report and decreed accordingly. The defendants appealed.

C. Jones, for complainant. 1. The judgments are valid. 8 Yerg. Rep. 420, 432: 10 Yerg. 310, *M'Nairy vs. Eastland*.

2. Was the conveyance fraudulent? The deed itself from J. to A. Read, from the suspicious terms of the considerations expressed upon its face and unsupported by proof, is *prima facie* evidence of fraud. It is not shown that any adequate consideration was paid, and in the absence of other proof fraud will attach. See 6 Rand. 618, where a conveyance from a father, who was in debt, to his son without any valuable consideration, is declared to be grossly fraudulent, and decreed to be set aside at the suit of creditors who obtained their decrees long after the execution of the deed. A transfer of property to a child by a man in failing circumstances, though there be no execution nor judgment against him, will be held fraudulent unless the child can prove the actual payment of a fair and full consideration. 1 Hay. 396. Where a father, being indebted, conveyed all his estate to his son,

• JACKSON,
April, 1839.

Jones.
v
Read.

resident with him, and changing places with him become the boarder and the son the landlord, the conveyance was held fraudulent and void as to creditors. 4 Mon. 584. A conveyance of property to a child without valuable consideration by one indebted at the time is void against creditors. 1 Atkins, 15: 1 Vez. 1. Such conveyance is at least *prima facie* evidence of fraud, and *onus* lies on defendant. 3 John. Ch. Rep. 450: 2 John. Ch. Rep. 35, 45, 46. Conveyances of property with fraudulent intent pass no estate, and are void against persons intended to be defrauded. Rob. Fraud. Con. 591-6. The relation between the grantor and the grantee constitutes a strong circumstance of suspicion. Rob. Fraud. Con. 198-9: 4 John. Rep. 581-2: 4 John. Rep. 593. Chancery lends its aid to judgment creditors. 2 John. Ch. Rep. 283. Chancery has power to assist judgment and execution creditors. 20 John. Ch. Rep. 554.

3. The records filed all show that the executions, based upon judgments, were levied within seven years, and according to the principle settled in *Reeves vs. Dougherty*, 7 Yer. this complainant can recover.

D. Fentress and A. Miller, for defendants, contended: 1. That the judgments of the complainant were void. 7 Yerger, 365.

2. That the defendant, Alexander Read, was protected by the statute of limitations. *Cocke and Jack vs. M^cGinnis, M.* and Yer. 361: *Porter's lessee vs. Cocke*, Peck, 41: *Hayter and Reeves vs. Dougherty*, 7 Yer. 222: 10 Yer. 521-59.

GREEN, J. delivered the opinion of the court.

The first question to be considered is, whether the judgments upon which this bill is founded are good and valid or are void? All these judgments (five in number) were obtained on motion for monies paid by the complainant as surety for James Read. In a case of this sort the judgment must recite upon its face and assume the existence of all the facts which are necessary to give the court jurisdiction. 3 Yerger, 361: 8 Yerger, 434. When this is done the judgment is valid and cannot be affected when attacked in this collateral

way by the fact that the conclusions of the court were not warranted by the proof. Judging by these principles the judgment, No. 1, for four hundred and eighty dollars and fifty cents, rendered on the 30th of November, 1832, is good and valid. The judgment, No. 2, for twenty-five dollars, is void, because it is not stated that any judgment had been rendered against Jones as the security of James Read. The judgment, No. 3, for seven hundred and sixteen dollars and seventy-two cents, rendered in the Giles county court 31st of May, 1833, does not assume the existence of the facts necessary to give the court jurisdiction. It states that Jones moved for a judgment for four hundred and seventy-six dollars and fifty-one cents, with interest from the 24th of July, 1824, which on that day he paid as security for the defendant, but it does not state that the fact so appeared to the court, but it states that it appeared that a judgment was rendered against the plaintiff and several others, as bail of James Read, for the sum of eight hundred and forty-seven dollars and fifty cents; to have authorized a judgment in favor of the plaintiff alone against Read it was indispensable that the sum he had paid as part satisfaction of the said judgment against Read's bail should have been proved, and the judgment should show on its face that the fact did so appear. It is true the rendition of the judgment against the bail would have authorized a judgment in their favor against Read, the principal, but in that case the judgment could only have been taken for the entire amount of the judgment against them and in the name of all the bail jointly. But this judgment is in the name of Jones only, and for monies he suggests in his motion (but which the court does not say so appeared) was paid by him. We think, therefore, this judgment is void. The judgment, No. 4, rendered the 28th of February, 1828, for nineteen dollars and ninety-six cents is regular, but the judgment, No. 5, rendered 1st June, 1833, for eighty-six dollars, is liable to the same objections which are taken to No. 3. It is not assumed as a fact appearing to the court that the plaintiff had paid this money as security for defendant.

Second. It is insisted that the judgments show upon their

JACKSON,
April, 1833.

Jones
v
Read.

JACKSON,
April, 1839.

Jones
v
Read.

face that the monies for which they were rendered were paid by the plaintiff for the defendant more than three years before the motions were made, and that the statute of limitations was a good defence, and that it may now be set up against this bill, which seeks a satisfaction of those judgments. Without expressing any opinion as to the application of the statute of limitations to a suit by motion, it is sufficient to observe that we cannot in this collateral way enquire into the regularity of judgments, and whether they might not have been defeated by the introduction of other evidence than that which was before the court, or by insisting on other defences, or whether the facts the court assumed as existing were sufficiently proved by the testimony before it. Our only enquiry is, are they valid or are they void? Although they may be irregular and liable to be reversed on a writ of error to a superior court, or upon the introduction of new proof, or different defences on a writ of error *coram nobis* in the same court in which they were rendered, still they may be executed either by process issuing upon them or by a bill in equity auxiliary thereto.

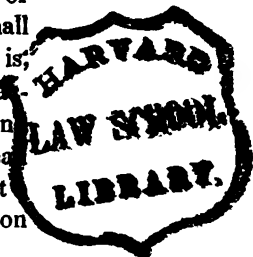
The third question is, whether the conveyance made by James Read to Hunt for the benefit of his son, and the one made by himself to his son, are fraudulent. We think there is no question but that these deeds were made in fraud of creditors. That the deed to Hunt was so made is manifest from the fact, that if it were fair and Alexander Read had actually paid for the land, there is no reason why the deed should not have been made directly to him. But it was conveyed by James Read to Hunt, and a bond was taken from Hunt to convey to Alexander Read, which he did in compliance therewith in 1831. It does not appear that any consideration was paid by Alexander to James Read, and this circuitry of conveyance was adopted doubtless in the expectation that the title bond would pass from Hunt to Alexander purified of the fraud; for Hunt proves that when the conveyance was made to him James Read told him that his object was to avoid the payment of some old debts. This express declaration does but accord with all the other parts of the transaction, every circumstance of which is a badge of fraud.

The subsequent deed from James to Alexander Read does not help the transaction; it was but a continuation of the original design, and when taken in connexion with the previous acts of the parties, contains fuller evidence of fraud. The display of the various considerations which are stated in this deed was a shallow contrivance to keep off creditors, and shows a consciousness that the transaction was surrounded by suspicion and needed something of this sort to show its fairness. Nor could the original contract, tainted as it originally was with fraud, be purified by the payment of an honest consideration accompanied by a new conveyance. But we are warranted in the conclusion that these considerations, which are set out in this deed, were not really and in good faith paid. If they were, the defendants, circumstanced as the case is, should have proved the payments as alleged. This has not been done, and we are authorized to conclude could not have been done. We have no doubt, therefore, of the fraudulent intent of these defendants in this transaction, and consequently the deeds under which Alexander Read claims title to this land are void as to the creditors of James Read.

JACKSON,
April, 1839.

Jones
v
Read.

The fourth question for consideration is, whether Alexander Read is protected by the second section of the statute of limitations of 1819, ch. 28. And the solution of this question depends upon the construction to be given to that act as to the time when the statute commences running, whether from the date of the fraudulent deed from James Read to Hunt or from the date of the complainant's judgments against Read. The act provides, "that no person or persons, or their heirs, shall have, sue or maintain any action or suit either in law or equity for any lands, tenements and hereditaments but within seven years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued." The only enquiry then is, when did the complainant's right to commence this suit accrue? Certainly not until after the relation of debtor and creditor had been produced between him and James Read by the rendition of the judgments; until then he was not creditor in the sense that would authorize him to question



JACKSON,
April, 1839.

Jones
v
Read.

this conveyance. The rendition of the judgments created a lien upon the defendants' lands, and authorized the complainant to come into equity to set aside this fraudulent deed and subject the land to sale; until then he could have maintained no bill for such a purpose, and, therefore, by the express words of the act, his right to commence this suit did not accrue before that time. The argument of the counsel for the complainant, that from the date of the fraudulent deed to Hunt the statute commenced running, gives to this second section an operation so different from the plain sense of its language that it cannot be countenanced for a moment. If that were so, the declaration of the act that a party shall sue within seven years after his right of action accrues, would be unintelligible and without meaning. The case of *Reeves and Hayter vs. Dougherty and Ewing*, 7 Yerg. Rep. 222, which is relied on to support this position, does not sustain the argument. That was a case where the negroes, to subject which the bill was brought, were in the possession of Mrs. Ewing more than three years after the judgment and execution at law, and consequently more than three years after the right to file the bill accrued. The only question, therefore, was whether the statute would run in favor of a possession, and operate to protect a title acquired by fraud. The court decided in accordance with all the modern authorities that it would. It is true one member of the court, in delivering his opinion, indicates that the statute would run in favor of the possession of a slave from the time possession should be taken, although no right of action existed in favor of any one until long after. But this was a loose dictum of one judge only upon a question not existing in the case, and clearly against the plain language of the act of 1715, ch. 27, sec. 5. It has always been holden under that act that possession of negroes belonging to an intestate's estate before administration be taken does not operate to confer a title on the possessor. And why? Because there was no person who had a right to sue. Why then should possession operate in favor of the possessor and bar the right of creditors before they have a right to sue? There can be no reason for the operation of the act in the one case which does not exist in the

other. We conclude, therefore, that the statute of limitations is no bar to the complainant's right to a decree in this case.

JACKSON,
April 1839.

Jones
v
Read.

The fifth and only remaining question is as to the extent of the relief. There can be no decree for the complainant except for the judgment No. 1 rendered 30th of November, 1832, for four hundred and eighty dollars and fifty cents. This judgment is regular and valid, and gave the complainant a right to file this bill. Seven years did not elapse from the date of its rendition to the 3d of October, 1835, the time this suit was commenced. The judgments Nos. 2, 3 and 5 are void for want of the assumption by the court of all those facts upon which its jurisdiction depended. The judgment No. 4 was rendered 28th February, 1828, and as more than seven years elapsed before the bill was filed, the right to the relief it seeks for the amount of that judgment is barred. The decree will therefore be reformed and rendered to the extent indicated.

JACKSON,
April, 1839.

MARR vs. RUCKER.

Marr
v
Rucker.

The plaintiff, in an issue upon the plea of fully administered, may prove assets not included in the inventory, or where there is no inventory returned he may show assets in the hands of the administrator.

Where a gift of slaves is made, either by deed or by parol, with a view to defraud creditors, and the donee holds them as his own for three years, the absolute title to such slaves is vested in the donee, as against the donor and his creditors, but the statute begins to run as against the creditors of the donor from the time judgment is rendered in the State in favor of such creditor.

To constitute the son the donee of the father, and to enable such donee to hold slaves in fraud of the creditor of the father, there must be proof of a gift either written or verbal, accompanied by a delivery and followed by an exclusive and adverse possession for three years.

Where the jury ascertained the plaintiff's debt to be seven hundred and four dollars and ninety-six cents, and assessed his damages at three hundred and forty-three dollars and thirty-two cents, and upon the plea of fully administered, found that the assets in the hands of defendant largely exceeded the debt in plaintiff's declaration: Held, that this finding was too vague, and that the jury should have ascertained by their finding that the assets were co-extensive with the amount of the verdict.

Thomas N. Eubank instituted an action of debt in the name of Margaret Rucker, for his use and benefit, in the circuit court of Haywood county, on the 6th day of June, 1837, against Ambrose R. Marr, administrator of Alexander Marr, deceased. At the June term, 1837, the plaintiff filed his declaration, in which he averred "that on the 25th day of January, 1832, at a circuit court of law and chancery held and continued for the town of Lynchburg, in the State of Virginia, at the court-house in said town, to wit, at the county of Haywood aforesaid, sitting as a court of chancery, the said plaintiff, by the judgment and decree of said court, recovered against one Benjamin Rucker and Armstead Rucker, who are not sued in this action or otherwise, and the said Alexander Marr, the sum of seven hundred and four dollars and ninety-six cents, and also six per cent. per annum interest on six hundred and ten dollars and thirty-seven cents, a part thereof, from the 29th day of December, 1829, till paid, of which said defendant was convict, as by the record and proceedings remaining in said court (a copy of which,

duly authenticated, is hereby shown to the court,) will more fully appear, which said judgment remains in full force, not reversed, vacated or satisfied; and the said plaintiff has not obtained any satisfaction or execution upon said judgment of either the said Benjamin Rucker, Armstead Rucker, not sued as aforesaid, or of said Alexander Marr, in his lifetime, or of the defendant, administrator of said Alexander," &c.

JACKSON,
April, 1839.

Marr
v
Rucker.

The defendant pleaded: first, *nul tiel record*; secondly, fully administered.

Issues were joined on these pleas. The court, upon the production of the copy of the record, decided that such copy sustained the allegations of the declaration in regard thereto. The issue of fact was submitted to a jury at the June term, 1838, judge Read presiding. It appeared in proof that M. Rucker had recovered a judgment against Alexander Marr, deceased, as set forth in his declaration, and that shortly after the recovery of said judgment, to wit, in the year 1831, Alexander Marr, then a resident of the county of ———, in the State of Virginia, owned and possessed some twenty-odd slaves, worth about the sum of nine thousand dollars, and other personal property, such as stock and household furniture, &c. and that the present defendant, who lived with his father, owned no property except two negroes, which his father had previously given him for the purpose of exempting him from working on the roads; that he had been engaged in no business or speculation since that period by which he had made any thing, and had received nothing by gift from any source, unless the slaves in controversy were given; that Ambrose Marr was the only son of the deceased; that the father and son resided together in the State of Virginia till the year 1830, when the son emigrated to the State of Tennessee and settled in Haywood county, bringing with him sixteen slaves, which had been previously claimed and possessed by his father; that in the following year he returned and brought out his father and six other slaves; that they had lived together in Haywood county, and that in Haywood defendant had claimed the negroes and controlled them; and the father had not claimed them or exercised acts of ownership further than ordering

JACKSON,
April, 1839.

Marr
v
Rucker.

them to catch his horse and the like. This state of things continued till the death of Alexander Marr. At what time that event took place does not appear. Ambrose Marr administered upon his estate, but at what time does not appear; nor does it appear from the proof that he returned any inventory whatever of estate belonging to the deceased. Judge Read charged the jury that if they believed the property in question was the property of Alexander Marr, the father, at or about the time the decree was made in Virginia, and Ambrose had acquired the possession thereof without paying a valuable consideration therefor, whereby he had held possession of the property, claiming it as his own for more than three years, with a view to defeat the decree, the property would not become vested in him so as to defeat the action of the plaintiff, and that the plaintiff would be entitled to a verdict, if they found such property in the hands of defendant as aforesaid.

The jury rendered a verdict, in which they find the plaintiff's debt to be seven hundred and four dollars and ninety-six cents, and his damages three hundred and forty-three dollars and twenty-two cents; and also that said defendant, as such administrator, has received an amount of assets much larger than the amount of the plaintiff's debt in the declaration mentioned, and that said defendant hath not paid or administered any of said assets so come to his hands.

The defendant moved the court to set aside this verdict, which was overruled, and judgment rendered in favor of the plaintiff for the debt, seven hundred and four dollars and ninety-six cents, and three hundred and forty-three dollars and twenty-two cents damages. The defendant appealed in error to this court.

Strother, for plaintiff in error. 1. The statements of witnesses were admitted by the court to show assets in the hands of plaintiff. This is error, as the administrator gives a bond for the faithful performance of his duties, one of which is that he shall render a full and complete inventory of all the personal property of his intestate which shall come into his hands. If he fails to do this he is liable on his bond, and

then evidence *aliunde* may be introduced; and so it would be on a suggestion of a *devastavit*; but in an issue of a plea of *plene administravit* it is incompetent. 2 Wen. Rep. 479; 12 John. Rep. 119.

JACKSON,
April, 1839.

Marr
v
Rucker.

2. The plaintiff in error proved that he had had the adverse possession of the slaves (attempted to be shown to be assets) from the year 1830 to the bringing of this action, and that he exercised entire control over them during that time. Yet the court charged jury that if they should believe that the property in question was the property of A. Marr, the intestate, at or about the time the decree was made in Virginia, and Ambrose R. Marr, the defendant, had acquired possession thereof without valuable consideration in law, whereby he had held the possession of them as his own property, with a view to defeat the decree, for more than three years, the property would not become vested in him whereby to defeat the action of the plaintiff. This was error, because the plaintiff having proven that he had had the adverse possession for more than three years before suit was brought against him, the court ought to have left the jury to ascertain whether there was an adverse possession, and if they so found, that then, by the statute of limitations, the law vested the absolute property in the plaintiff; for in this case the court had no right to enquire into the consideration given, or the intention with which the property was acquired. Mar. and Yer. *Cocke and Jack vs. McGinnis*: 7 Yer. 233, *Reeves vs. Dougherty*: 20 John. Rep. 33. Before the first of January, 1833, a bill of sale proved and registered was not necessary to pass the title of a slave between the parties themselves. 8 Yer. 392; 5 Yer. 282.

3. There is error in the verdict, because the jury do not find the specific amount of assets; they do not find that the plaintiff had assets to an amount greater or equal to their verdict, but on the contrary they find that plaintiff had assets to a much larger amount than the amount of said debt in his declaration mentioned; they do not say how much more than the debt, which was seven hundred and four dollars and ninety-six cents: the verdict is for that amount of debt, and three hundred and forty-three dollars and twenty-two cents

JACKSON,
April, 1839.

Marr
v
Rucker.

damages, making the whole amount of the verdict one thousand and forty-eight dollars and ninety-eight cents. This, for any thing that appears to the contrary, may exceed the amount of any supposed assets, and is error. 5 Cranch, 19: 9 Yer. 414.

Loving, for defendant in error. 1. No authority can be found which limits the plaintiff in his proof on an issue on the plea of "fully administered" to the production of the inventory or a copy. To do this would be to give an executor or administrator the power, by the non-return of an inventory, to cut off all proof whatever. In this case the administrator has returned no inventory, and fraudulently claims the whole estate of his intestate, worth not less than ten thousand dollars. Can it be possible that the plaintiff, in a case like this, can introduce no proof to show the jury that assets had come to the hands of the administrator, for the reason that he had made and returned no inventory, and that the plaintiff in consequence thereof would be bound to sue on the bond? The non-return of an inventory is of itself evidence of a *devastavit*. If, then, evidence is inadmissible of assets unadministered, the fraudulent administrator is permitted to take advantage of his own wrong and is protected in a fraudulent violation of his duty. The settled practice of our courts justifies the admission of evidence so conformable to reason and so entirely necessary to the attainment of justice.

2. There is no proof of a gift either written or verbal from the intestate to the defendant; no consideration nor conveyance, (act of 1831, ch. 90, sec. 1,) and no delivery and possession exclusive and adverse for three years. The charge, therefore, of the circuit judge, that the statute of limitations would not protect a fraudulent donee against the *bona fide* claims of creditors, is wholly inapplicable to the facts of this case, and though erroneous it is not just cause of reversal.

REESE, J. delivered the opinion of the court.

Three objections have been taken in argument by the counsel for the plaintiff in error to the proceedings and judgment

of the court below. First, that the defendant below having returned no inventory, it was not competent for the court to hear proof to fix the defendant below with assets, but the remedy of the plaintiff in such case is by action on the administration bond. To sustain this position we have been referred to cases in the State of New York. These cases have been founded upon a statute of that State. By the principles of the common law, and the immemorial practice of the courts in England and in Tennessee, upon the issue of fully administered the plaintiff may show and prove assets not included in the inventory. Second, that the court erred in charging the jury that if the supposed gift from the father to the son were made to defeat or embarrass the creditors of the former in the collection of their just debts, the adverse possession of the son as against the father would not give him title as against the creditors of the father, or prevent the negroes in question from being regarded in a suit by such creditors as assets. This we consider as the meaning and legal effect of the charge. As an abstract and general proposition, the charge upon the point was erroneous; but in the aspect of the proof and the attitude of the parties before the court, we do not deem it such error as would make it the duty of this court to reverse the judgment; first, because there was no proof of a gift, written or verbal, from the father to the son, accompanied by delivery and followed by an exclusive adverse possession for three years, and because, especially, in the second place, we have at this term of the court decided, in the case of *Jones vs. Read*, that the statute of limitation, in the case of a fraudulent gift or conveyance, runs in favor of the vendee or donee against the vendor's or donor's creditors from the time only when they obtain judgment against the vendor or his representatives. In this case the judgment in Virginia is not such judgment as is referred to in the above case, but was the evidence only upon which to obtain a judgment in this State. The statute, therefore, in such case would not give to the fraudulent vendee or donee a good title as against the creditor, the plaintiff in this action. But, thirdly, it is contended that the judgment shall be reversed, because the verdict of the jury upon the plea of

JACKSON,
April, 1839.

Marr
v
Rucker.

JACKSON.
April, 1839.

Gardner
v
Brown.

fully administered finds that the defendant had received assets which he had not paid out to an amount much larger than the amount of the plaintiff's debt in the declaration mentioned, which was seven hundred and four dollars and ninety-six cents, and they assess the damages at three hundred and forty-dollars and twenty-two cents. The term "much larger amount" is too vague to cover the damages assessed; the jury should have ascertained by their finding the assets to be co-extensive with the amount of the entire verdict. This is well settled by authority. See 9 Yerger, 414, and the cases there cited. The proof making it more than probable that the assets greatly exceeded the amount of the verdict, we feel much reluctance in setting aside the judgment, but we are constrained to do so.

GARDNER AND MOSELY vs. BROWN.

When the sheriff reported land as liable for double taxes in the name of Caleb Cross's heirs, and the land was ordered to be sold for the payment of such taxes, as the property of Caleb Cross, when the land in fact belonged to John Anderson at the time of such report and judgment: Held, that such judgment was void and communicated no title to a purchaser under it.

The act of 1813, ch. 98, requires that the order of sale should set forth the number of the entry and the grant, with the specialties belonging to them, if there was both an entry and grant; and if no grant, then the number of the entry and the specialties belonging to it.

Jesse Brown instituted an action of ejectment on the 11th day of October, 1836, in the circuit court of Weakley county against Alfred Gardner and Robert Mosely for the recovery of the possession of six hundred and forty acres of land lying in the county of Weakley, in the twelfth surveyor's district, on the waters of Obion river, in range one, section nine. The defendants entered into the common rule, and the cause came on for trial at the June term, 1839, before Judge Harris and a jury. The plaintiff read a grant for the land in controversy from the State of Tennessee to Jesse Brown, bearing date 3d January, 1827, duly registered, and reciting that "in consideration of military services performed by Caleb

JACKSON,
April, 1839.Gardner
v
Brown.

Cross for the State of North Carolina, warrant, No. 5050, dated 6th December, 1797, for six hundred and forty acres, and entered on the 23d day of March, 1823, No. of entry, 1328, there is granted by the State of Tennessee unto Jesse Brown, assignee of the trustees of the University of North Carolina, a certain tract or parcel of land containing six hundred and forty acres."

It was admitted that defendants were in possession of the land covered by the grant and that it lay in the county of Weakley. The defendants then read to the jury a transcript of certain proceedings of the county court of Weakley in the following words:

"State of Tennessee, Weakley county. At a court of pleas and quarter sessions begun and held for said county on the 4th day of January, in the year of our Lord 1828, being the second Monday in said month, at the house of John Terrill, there being no court-house in said county, before the worshipful J. R. Shultz, Stephen Smart, J. H. Ward, &c. &c. esquires, justices of the peace for said county.

"January 15, 1828. Tuesday morning, nine o'clock, court met according to adjournment, present, the worshipful John Webb, J. R. Shultz, Joseph Wilson, &c. &c. &c. esquires, justices of the peace for said county. The court then proceeded to lay a tax for the present year, a majority of the justices present, when it was ordered that the State tax be according to the law of this State. The court then proceeded to lay a tax to meet the contingent expenses of this year, when it was ordered that the tax should be as follows, to wit: on each hundred acres of land eighteen and three-fourth cents, for the support of the jury eighteen and three-fourth cents, for public building twenty-five cents.

"State of Tennessee, Weakley county, January sessions, 1829. At a court of pleas and quarter sessions, begun and held for the county of Weakley, at the court-house in the town of Dresden, on the second Monday in January, A. D. 1829, it being the 12th day of said month, present, the worshipful John Webb, J. H. Ward, John R. Shultz, Stephen Smart, &c. &c. esquires, justices of the peace for said county, and Joseph Ury, deputy clerk.

JACKSON,
April, 1839.

Gardner
v
Brown.

"Tuesday, January sessions, 1829. Court met according to adjournment, present, the worshipful John Webb, Perry Vincent and John M. Shultz, esquires. The court then proceeded to lay a tax for the purposes of county revenue, &c. when it was ordered and decreed by the court that the following rates of taxes upon the following property hereinafter mentioned be established for the present year, to wit: that the State tax upon each hundred acres of land be eighteen and three-fourth cents, as heretofore established by law; in addition to which there shall be levied upon each and every hundred acres of land the following tax for the following purposes, to wit: to defray the expenses of the county eighteen and three-fourth cents, to defray the expenses of jurors eighteen and three-fourth cents, and for public building eighteen and three-fourth cents.

"State of Tennessee, Weakley county. January sessions, county court, 1830. At a court of pleas and quarter sessions, begun and held for said county at the court-house in the town of Dresden, on the second Monday in January, being the 11th day of said month, in the year of our Lord 1830, before the worshipful John Webb, J. R. Shultz, Stephen Smart, Joseph Wilson, Daniel Campbell, Perry Vincent, &c. &c. &c. esquires, justices of the peace for said county, and William H. Johnson, clerk. The court then proceeded to lay a tax for the purposes of county revenue, &c. when it was ordered and decreed by the court that the following rates of taxes upon the following property hereinafter specified be established for the present year, to wit: that the State tax upon each hundred acres of land be eighteen and three-fourth cents, as heretofore established by law; in addition to which there shall be levied on each hundred acres of land the following taxes for the following purposes, to wit: to defray the county expenses eighteen and three-fourth cents, to defray the expenses of jurors eighteen and three-fourth cents, for the support of the poor twenty-five cents, and to defray the expenses of building the court-house twenty-five cents.

"State of Tennessee, Weakley county. At a court of pleas and quarter sessions, begun and held in and for said

county of Weakley, at the court-house in the town of Dresden, on the second Monday in January, it being the 10th day of said month, in the year of our Lord 1831, before the worshipful J. R. Shultz, Stephen Smart, P. Vincent, &c. &c. esquires, justices of the peace for said county, and William H. Johnson, clerk.

JACKSON,
April, 1839.

Gardner
v
Brown.

"Friday, January sessions, 1831. This day, being the day appointed on Monday for the transaction of county business, the court proceeded. Present, T. C. White, J. H. Moore, E. D. Dickson, Perry Vincent, J. R. Shultz, &c. &c. esquires, being a majority of the justices of said county of Weakley, to lay the taxes for the year 1831, to wit: for county contingences the following tax, on each hundred acres of land twelve and a half cents; for building the court-house eighteen and three-fourth cents. And it appearing to the satisfaction of the court that it is necessary to lay a tax for the support of the poor for the year 1831 in said county, it is therefore ordered by the court that a tax of six cents be laid on each hundred acres of land. Ordered, that the clerk tax the State tax on all taxable property in said county, for 1831, as prescribed by law.

"Tuesday, January sessions, 1832. This day, before the worshipful T. C. White, Perry Vincent, J. F. Coult, &c. &c. &c. esquires, justices of the court of pleas and quarter sessions, came Alfred Gardner, sheriff and collector of the public taxes for said county, and presented here into court the following report, to wit:

"State of Tennessee, Weakley county, January, 1832. I, Alfred Gardner, sheriff and collector of the public taxes for the county of Weakley, do hereby report to court the following tracts and parts of tracts of land and town lots as having been omitted to be given in for the taxes for the years 1828, '29, '30 and '31, as specified in this report; that the same lie within the limits of this county; that the same are liable for double taxes for said years; that the double taxes thereon remain due and unpaid for the years as hereinafter specified, and the respective owners or claimants thereof have no goods or chattels within my county on which I can distrain for said double taxes, to wit, (amongst others:)

JACKSON,
April, 1839.

Gardner,
v
Brown.

"Caleb Cross's heirs, six hundred and forty acres, entry No. 1328, lying in the twelfth district, first range and ninth section, reported for the year 1828, clerk's fee one dollar and forty cents, sheriff's one dollar, printer's one dollar and fifty cents, taxes four dollars and forty cents; for 1829, clerk's fee one dollar and forty cents, sheriff's one dollar, printer's fee one dollar and fifty cents, taxes four dollars and forty cents; for 1830, clerk's fee one dollar and forty cents, sheriff's one dollar, printer's one dollar and fifty cents, taxes four dollars and forty cents; for 1831, clerk's fee one dollar and forty cents, sheriff's one dollar, printer's one dollar and fifty cents, taxes four dollars and forty cents.

"January 10th, 1832.

ALFRED GARDNER,

Sheriff and collector for Weakley county."

"Whereupon it is considered by the court that judgment be and is hereby entered against the aforesaid tracts of land and parts of tracts of land and town lots in the name of the State for the sums annexed to each, being the amount of double taxes, costs and charges due severally thereon for the years 1828, '29, '30 and '31, as therein specified; and it is ordered by the court that said several tracts of land and parts of tracts of land and town lots, or as much thereof as shall be sufficient of each of them to satisfy the double taxes, costs and charges annexed to them severally, be sold as the law directs.

"Order of sale: State of Tennessee, to the sheriff of Weakley county, greeting: You are hereby commanded to execute and return the following order of sale, to wit:

"State of Tennessee, Weakley county... Court of pleas and quarter sessions, January session, 1832. Whereas, Alfred Gardner, sheriff and collector of the public taxes for the county of Weakley, reported to court the following tracts and parts of tracts of land and town lots as having been omitted to be given in for the years 1828, 1829, 1830 and 1831, as specified in this report, that the same are liable to double taxes for said years, and that the same be within the limits of Weakley county, and that the double taxes thereon remain due and unpaid for the years hereinafter specified, and that the respective owners or claimants thereof have no

goods or chattels in his county on which he can distrain for said double taxes, to wit: (amongst others,) Caleb Cross's heirs six hundred and forty acres, No. 1328, lying in the twelfth surveyor's district, first range and the ninth section, reported for the year 1828: clerk's fees one dollar and forty cents, sheriff's fee one dollar, printer's fee one dollar and fifty cents, taxes four dollars and forty cents; 1829, clerk's fees one dollar and forty cents, sheriff's fee one dollar, printer's fee one dollar and fifty cents, taxes four dollars and forty cents; 1830, clerk's fees one dollar and forty cents, sheriff's fee one dollar, printer's fee one dollar and fifty cents, taxes four dollars and forty cents; 1831, clerk's fees one dollar and forty cents, sheriff's fee one dollar, printer's fee one dollar and fifty cents, taxes four dollars and forty cents; total thirty-three dollars and twenty cents, &c. &c.

ALFRED GARDNER,

Sheriff and collector for Weakley county."

"Whereupon it is considered by the court that judgment be and is hereby entered against the aforesaid tracts and parts of tracts of land and town lots in the name of the State, for the sums annexed to each, being the amount of double taxes, costs and charges due severally thereon for the years 1828, 1829, 1830 and 1831, as there specified, and is ordered by the court that said several tracts of land and town lots, or so much thereof as shall be sufficient of each of them to satisfy the double taxes, costs and charges annexed to them severally, be sold as the law directs.

WILLIAM H. JOHNSON,

Clerk Weakley county court.

"Endorsed: 'Order of sale for double taxes for the years 1828, 1829, 1830 and 1831. Issued 10th February, 1832, came to hand the same day issued.

ALFRED GARDNER,

Sheriff and collector for Weakley county.'

"Sheriff's return: State of Tennessee, Weakley county, November 5th and 6th, 1832, being the first Monday in said month and the succeeding day. Be it remembered, that I, Alfred Gardner, sheriff and collector of the public taxes for the county of Weakley, in obedience to the foregoing judgment and order of sale, after the same came to my hands,

JACKSON,
April, 1832.

Gardner
v
Brown.

JACKSON,
April, 1839.

Gardner
v
Brown.

forthwith caused it to be advertised duly and properly in the several newspapers printed and published in the several places, as by the statutes is made and provided, in each of said papers three times successively, three months before the day of sale, setting forth and stating in said advertisement, so published as aforesaid, that on the first Monday in November, 1832, and the succeeding day, at the court-house door in the town of Dresden, I should offer and expose to public sale, according to the acts of assembly in such cases made and provided, the said several tracts and parts of tracts in said order of sale mentioned for the double taxes, cost and charges, for the several years therein specified, unless the same were previously paid and satisfied. In pursuance of which said order of sale and advertisement as aforesaid, I, Alfred Gardner, sheriff and collector as aforesaid, at the court-house in the town of Dresden, on the said first Monday in November, 1832, and the succeeding day, being the 5th and 6th day of said month, between the hours of ten o'clock in the forenoon and sunset of each day, offered and exposed to public sale, according to the statutes in such cases made and provided, the following tracts of land and parts of tracts of land in said order of sale mentioned, the double taxes, costs and charges thereon then and there remaining due and unsatisfied as specified in said order of sale; and after having duly and properly cried, offered and exposed the said land, or so much thereof as would be sufficient to satisfy the double taxes, cost and charges due thereon, and thereupon sold the same to the following persons, who respectively bid therefor, as each tract was severally exposed, and offered to take the same and pay the double taxes, costs and charges, for the whole number of acres as herein after expressed; and after further offering and crying the same, and no other person offering to pay the double taxes, costs and charges for a less number of acres the same were by me bid off to the respective persons as follows, to wit: (amongst others,) the tract of six hundred and forty acres, entry No. 1328, reported in the name of Caleb Cross's heirs for the years 1828, 1829, 1830 and 1831, to Henry A. Garrett and Robert Mosely jointly, for the sum of thirty.

three dollars and twenty cents, it being the amount of double taxes and costs due for said year.

JACKSON,
April, 1839.

ALFRED GARDNER,

Sheriff and collector for Weakley county."

Gardner
v
Brown.

The defendants then read a deed, duly proven and registered, from the sheriff and collector of the taxes for the county of Weakley for the land in controversy to H. A. Garrett and Robert Mosely, and a deed from Garrett to A. Gardner, also proven and registered. The court charged the jury that (the identity of the land covered by Brown's grant and the title papers of the defendants being admitted as well as the possession of defendants) the plaintiff was entitled to a verdict unless his title was divested by the judgment of the county court of Weakley and sale of the land for taxes. He further charged the jury that the record read by the defendants showed that the land was reported as entry 1328 for six hundred and forty acres in the name of the heirs of Caleb Cross; that as said entry had been assigned to the plaintiff, and the grant had been issued in his name, the land should have been reported in the name of Jesse Brown, the true owner; that it not having been so reported, the judgment of the county court ordering the sale was void and communicated no title to the defendants. The jury rendered a verdict for the plaintiff, and a motion for a new trial being made and overruled, the defendants appealed in error to the supreme court.

M. Brown, for plaintiff in error. The question turns on the validity of the judgment of the county court of Weakley condemning the land for taxes. The only objection raised to the record in the court below was, that the land was reported in the name of the heirs of Caleb Cross, when the title had passed into Jesse Brown, and was in him at the date of the report and judgment; which the judge presiding decided was a good objection, and declared the judgment, sale and proceedings under them were absolutely void.

The report of the sheriff, judgment and order of sale are in the exact forms prescribed by the statute of 1819, ch. 53. The report shows that the land lies in Weakley county,

JACKSON,
April, 1839.

Gardner
v
Brown.

that the taxes are due and unpaid, and that there was no personal property that could be distrained for the payment. These are all the facts necessary to give jurisdiction, and the sheriff is the proper person to report them. The judgment and order of sale, issued to the sheriff, on which said land was sold, also contain these facts, and are in strict pursuance of the statute of 1819, ch. 53. *Hamilton vs. Buram*, 3 Yerger, 355, and *Anderson vs. Williams, et. al.** (not reported) were cases of reports made for single taxes and do not conflict with this case; on the contrary, the principles there decided are referred to as fully sustaining this case.

The decision of the court below, declaring the judgment void because it was not in the name of the true owner, is clearly erroneous. The statute of 1803, ch. 3, sec. 3, 1 Scott, 763, and 1813, ch. 98, sec. 3, 2 Scott, 159, makes the true owner immaterial, so that the land be correctly described so as to distinguish it, which is well done in this case. See Cook's Rep. 362: 4 Haywood, 63. The statute of 1826, ch. 36, never applied to double tax sales, and was only directory in the cases where it did apply.

Before the statute of 1803, the proceedings to enforce the payment of taxes was in *personam* only. 5 Haywood, 298. The true owner must be cited; notice was necessary before judgment, and then the levy must be made; no lien attaching before levy. The case of *McCarroll and Weeks*, 2 Tenn. Rep. and *Francis vs. Washburn*, 5 Haywood, 294, were both judgments rendered on the laws prior to 1803, and so were nearly all the cases reported in the books. But the statutes of 1813 and 1819 changed the nature of the proceedings entirely. No personal notice is required. The law fixes the lien the hour the tax is laid, and no conveyance or transfer before or after the tax is laid divests the lien. The judgment is *in rem*. It is not that the State recover of the owner, to be levied of his lands, but it is "that judgment be and is hereby entered against the aforesaid tract or tracts of land in the name of the State," &c. No notice issues before judgment. Every man who owns land knows it, and

*See appendix to this term.

the law gives him notice to come and pay the taxes due the State. It is not a case *ex parte*, in which one individual is moving against another, but it is the State demanding support from its citizens in return for the protection they receive. 2 Tenn. 219 and 220. It is on this ground that, after the facts which give jurisdiction are found on the record, the presumption of law is in favor of the regularity of the proceedings. A judgment thus rendered is binding and conclusive when attacked in a collateral way, although it might be erroneous and reversible, and after reversal the purchaser would not be affected. 4 Hay. 63; 1 Star. Ev. 238, and various other authorities.

JACKSON,
April, 1839.

Gardner
v
Brown.

The certainty of the description of the land in this case is the highest degree of certainty. The description of number, entry, district, range and section determines its location and distinguishes it from all other lands with mathematical certainty. The surveyors' districts were laid off and the range and section lines run in 1819 before any counties were laid off. See 2 Hay. and Cobbs' Digest, 86 and 87. The counties were laid off by these district, range, and section lines. (See for illustration the counties of Henry and Weakley.) Statute 1821, ch. 32, sec. 1, and 1823, ch. 112.

These public laws, (which the court is bound to notice judicially,) and the description given by the report of the sheriff, "entry No. 1328, lying in the twelfth surveyor's district, in the first range and ninth section," will enable this court, without leaving their seats, to determine not only that this land lies in Weakley county, but also the part of the county in which it does lie. The entry too distinguishes it from all others.

John Dunlap, for defendants in error: 1. If a claim be set up under a judgment of another court, this court will examine into the jurisdiction of that court, and if it has not the power or jurisdiction which it assumed to exercise, its judgment will be disregarded. 1 Yer. 125, *Hodges vs. Deaderick*. See 1 Peters, 340, as to the power of the courts to look collaterally into the proceedings of other courts. Courts of special and limited jurisdiction derogating from the general

JACKSON,
April, 1839.

Gardner
v
Brown.

jurisdiction of the courts of the common law are ever strictly restrained, and cannot be extended farther than the letter of their powers will clearly warrant. 2 Chitty's Black. 66: 2 Williams, 408-409. See the case of *Dixon vs. Caruthers*, 9 Yer. 30, where a judgment rendered by a justice for more than one hundred dollars was held to be void; in that case the justice had jurisdiction for a part of the amount he gave judgment for, as it will be contended the county court had in this case.

2. It is insisted that the court did not err because the land was not reported in the name of the true owner, required by the act of 1826, ch. 36, sec. 1. Pamphlet act 49, Hay and Cobbs, 338. This act of 1826, it is insisted, repeals the act of 1823, ch. 98, sec. 3 and 16; which act of 1826 makes it the duty of the commissioners appointed by the county courts for the Western District to make their reports of land in the name of the real owner. The act of 1821, ch. 69, sec. 1, Hay and Cobbs, 353, makes it the duty of the principal surveyors west of the Tennessee river to furnish the clerks of the different counties in the district with a list of lands lying in their counties once a year, stating distinctly in said list the names of the owner, and whether held by deed, grant or entry. See the act of 1819, ch. 53, sec. 11, same book, 354. It is also made the duty of all public officers, clerks, registers and others, to furnish the sheriff with information as to the owner's name; with such aids and means of information furnished the sheriff by the law and the public officers he can scarcely be mistaken as to who is the owner of the land.

3. Admitting the act of 1813, which dispenses with a report of the land in the true owner's name, to be in full force, it is insisted that neither the report nor advertisement made by the sheriff is made in pursuance of said act. When reported in the name of the true owner a general description is sufficient, as has been given in this case, but when the report is made in the wrong name, as has been done in this case, a description including all specialties is required by said act. The act requiring the report to be made in the name of some person, and being made in the name of Caleb Cross's heirs

which is too general to designate any particular person, it is therefore insisted that the report has not been made in the name of any person. The heirs not being designated by name, and the report wanting a name as the claimant or owner of the land, the sheriff could not report the fact that the claimant or owner thereof (which means the person in whose name the land has been reported) has no goods or chattels upon which he can levy for said taxes; nor can the court make their order of condemnation for the sale of said land until said return is made by the sheriff that he can find no goods and chattels of the owner or claimant; and the act of 1813 makes the taxes assessed a lien upon all the property both real and personal of the person in whose name the land has been reported. See Cook's Rep. 360.

JACKSON,
April, 1839.

Gardner
v
Brown.

4. No presumption can be raised in behalf of a collector who sells real estate for taxes to cover any radical defect in the proceedings; the proof of regularity rests upon the person claiming under the tax sale. 4 Peters, 359. In the case in Peters the description given in the advertisement was half of lot No. 4, square 491; the court held this to be bad because it had not been described as the undivided half.

5. Defendants should have proved the advertisement upon the trial of the cause. It is insisted that the plaintiff's return of the sale and his statement that he had complied with the requisitions of the law is not sufficient; he should have stated the facts in his return relative to the advertisement, for if the advertisement is not made as directed by the act of 1822, ch. 181, (Hay. and Cobbs, 344,) the sale is declared to be void. The facts must be stated in the sheriff's return, if his return be evidence, but the court may judge whether the law has been complied with, as was done in the case of *Hamilton vs. Barum*, 3 Yer. 355. Nothing can be left to intendment. There the court would presume nothing in favor of the judgment of the court. The reason is much stronger for not presuming any thing in favor of the acts of a public officer. That all pre-requisites must be shown to have been done before a valid sale can be made, see 9 Cranch, 64: *Parker vs. Rulo's lessee* C. R. S. C. U. S. 271.

6. As this proceeding is not strictly *in rem*. but mixed, being

JACKSON,
April, 1839.

Gardner
v
Brown.

first against the personal property and then the land, it must be governed by the strict rules of the common law as to the admission of the record in evidence: this record cannot therefore be read, for Brown was not a party and does not claim under those who were parties subsequent to these proceedings, his right being complete prior to the proceedings.

Below the court will find a collection of the cases by the Supreme Court of the United States upon the subject of tax sales. *Stead's executors vs. Course*, 4 Cranch, 403; *Parker vs. Rule's lessee*, 9 Cranch, 64; *Williams, et al. vs. Peyton's lessee*, 4 Wheaton, 77; *M'Clung vs. Ross*, 5 Wheaton, 116; *Thatcher, et al. vs. Powell, et al.* 6 Wheaton, 110; *Rockendorf vs. Taylor*, 4 Peters' C. C. Rep. 349. Same cases in the Condensed Reports of the Supreme Court United States. *Stead's executors vs. Course*, 2d vol. 151; *Parker vs. Rule's lessee*, 3d vol. 271; *Williams, et al. vs. Peyton's lessee*, 4th vol. 395; *M'Clung vs. Ross*, 4th vol. 603; *Thatcher vs. Powell, lessee*, 5th vol. 28.

REME, J. delivered the opinion of the court.

The question involved in this case is the validity of a tax sale under which the plaintiff in error claims title. The sheriff in January, 1832, reported the land which is the subject of controversy as liable for double taxes for the years 1828, 1829, 1830 and 1831, by the following description of it, to wit: "Caleb Cross's heirs six hundred and forty, entry No. 1328, lying in the twelfth district in the first range ninth section." The order of sale contained the same description. Cross's heirs were not the true owners; for the entry having been assigned, the land on the 3d day of January, 1827, was granted to Jesse Brown the lessor of the plaintiff. On the one side it is insisted that the act of 1826, ch. 36, which makes it "the duty of the commissioners appointed by the county court south and west of the congressional line, in receiving and reporting a list of the taxable property, to report all the lands so reported by them in the name of the real owner, giving at the same time the number of entry, section and range," &c. applies to the sheriff in making his report of land liable to double taxes. This proposition is de-

JACKSON,
April, 1839.Gardner
v
Brown.

nied on the other side, and it is insisted that the duty of the sheriff in that respect is prescribed and governed by the acts of 1813, ch. 98, and 1819, ch. 53. Without deeming it necessary here to determine the effect and operation of the act of 1826, ch. 36, in a case of double taxes, let us enquire whether the sale in the record before us be good according to the provisions of the acts of 1813 and 1819 referred to. The third section of the first named act declares that "the public tax shall be and remain a lien upon all land and other species of taxable property, notwithstanding the same may have been divided or alienated, and notwithstanding the same may have been listed and advertised in the name of others than those who actually own the same at the time of the return of such property or sale thereof, although the owner be not known, provided that such land or other property be specially and particularly described in such return and advertisement; and it shall be the duty of the collector of public taxes to give the number of the grant or entry, with all special calls, in his advertisement." Without insisting that this section, by its terms, provides only for the continuance of the lien under the circumstances described, but taking it to mean what in terms it does not declare, that the sale in such cases shall be good, the enquiry recurs, Is the sale in the case before us in conformity with its provisions? We answer it is not, in two particulars: first, the land is not particularly and specially described in the return; and secondly, it is described by the number of the entry, and not by the number of the grant. The words of the section indeed, are that it shall be described by a reference to the "grant or entry;" the meaning of which is, that if the land be granted the number of the grant shall be referred to, and if it be not granted, that the number of the entry shall be referred to, and not that, in case of granted land, a reference may be made by the officer, at his election, to the number either of the grant or entry. It is to be observed that in case of claimants by mere conveyance it might well, and would often happen, that the deed would have reference to the number of the grant and not to that of the entry, and the notice intended to be given in such case would be more like-

JACKSON,
April, 1839.

Gardner
v
Brown.

ly noticed by reference to the number of the grant. Such would be our view of this section in application to the case before us, if it stand alone; but if it be said that the reference to the number of the grant or entry is required in relation to the advertisement, we reply that the sixteenth section of the same act makes it the duty of the clerk in the order of sale to express "the number of the grant or entry or both, as the case may be, together with all the specialties belonging to such claim." This section shows that where there is an entry and grant the number of each must be stated in the order of sale itself, as well as the specialties belonging to them. And the act of 1819, ch. 53, sec. 1, in the form of the sheriff's report and order of sale thereon given, requires that the number of the grant and entry, and their dates likewise, should be stated, and the water course upon which the land lies. If it be said that the act of 1826, ch. 36, dispenses with the provisions of the acts above referred to in this section of the statute, and substitutes a mode of description applicable to the land system here, we reply that the argument of the plaintiff in error is that that act does not apply to the case of a collector's report for double taxes, and if that argument be founded in error then the collector is required to report in the name of the real owner, which is not done. The judgment of the court below must be affirmed.

APPENDIX.

[This case, decided at the April term, 1837, at Jackson, was omitted in the Reports of that date. It was intended to settle more conclusively the principles involved in the case of *Hamilton vs. Burum*, in which judge Catron dissented and judge Whyte gave no opinion. It is therefore inserted here.]

ANDERSON vs. PATTON and LOWDER.

Where land is sold by judgment of the county court for the taxes, the grounds of fact upon which the jurisdiction rests must appear in such judgment, or it will be void and convey no title to the purchaser.

JACKSON,
April, 1837.

Anderson
v
Patton.

The jurisdiction of the county court rests upon the following facts: First, that the land lies in the county. Second, that the taxes remain due and unpaid. Third, that there is no personal property on which the collector can levy for the satisfaction of the taxes.

If the county court in their judgment omit to assume the facts upon which their jurisdiction rests, or themselves to state their existence, but instead thereof allege that they have been communicated to them by some officer or agent of the public, then the public must have entrusted such agent or officer to make to them the communication, or their jurisdiction will not appear.

If the judgment omit to state that the land lies in the county, but this fact is stated by the sheriff in his report, the judgment will be void notwithstanding, the sheriff not being the officer appointed by law to make such communication to the county court; nor will the return of the surveyor alter the case, as such return is not a part of the evidence in the case or a proceeding in it, and as the court cannot look behind the judgment for evidence to sustain its validity.

John Anderson instituted an action of ejectment in the circuit court of Carroll county on the 4th day of December, 1834, against Jacob Lowder and William L. Patton for the recovery of the possession of six hundred and forty acres of land lying in the county of Carroll, in range one, section four. The cause was continued from time to time till the March term, 1837, when it was submitted to a jury, judge Martin presiding. The plaintiff read a grant for the land in contro-

JACKSON,
April, 1837.

Anderson
v
Patton.

very from the State of Tennessee, bearing date the 7th day of June, 1822, and duly registered in the register's office of West Tennessee, and proved that the defendants were in possession of the land at the time of the issuance of the writ, and that it lay in the county of Weakley. The defendants then offered as evidence in this case a record of the proceedings of the county court of Carroll county, in the following words:

"Pleas at a court of pleas and quarter sessions begun and held for the county of Carroll, in the State of Tennessee, at the court-house in the town of Huntingdon, on the second Monday in December, A. D. 1826: Present, the worshipful Nathan Nesbitt, &c. &c.

"Be it remembered, that heretofore, to wit, on or before the 11th day of April, 1822, Robert E. C. Dougherty, principal surveyor of the twelfth surveyor's district of the State of Tennessee, returned and transmitted into the clerk's office of the court of pleas and quarter sessions in and for said county of Carroll a list of lands lying and being within the bounds of said county of Carroll, and subject to taxation for the taxes of the year 1822, which list of claims so transmitted the clerk of said court carefully recorded in a book kept by him for that purpose, in alphabetical order, as prescribed by law. And amongst other tracts of land in said list of claims so by the said surveyor returned as aforesaid and by the clerk recorded as aforesaid there was one tract or parcel of land recorded in the name of John Anderson for six hundred and forty acres, entry No. 120, range one, section four; and at the term aforesaid an order was made in the words and figures following, to wit: "Ordered by the court, that Nathan Nesbitt, esquire, be appointed to take the list of the taxable property and polls in the bounds of captain Moffit's company for 1827, and that he make return to the next term of said court." And at the March term, 1827, of said county court, present, the worshipful Nathan Nesbitt, esquire, &c. &c. &c. Be it remembered, that at the said term an order was made in the words and figures following, to wit: "Ordered by the court, that the county tax be laid at the following rates for the year 1827, for the purpose of meeting all county de-

mands: County tax on land eighteen and three-fourth cents; jury tax on land twenty-five cents; poor tax on land six and one-fourth cents; navigation tax on land six and one-fourth cents; bridge tax twelve and one-half cents; county tax on town lots thirty-seven and a half cents; bridge tax six and one-fourth cents; jury tax twelve and a half cents; poor tax six and one-fourth cents; white poll twelve and a half cents; black poll twenty-five cents; stud horse, the season of a mare; tax on retail groceries, stores, hawkers and pedlars five dollars each." And at the term last aforesaid, Nathan Nesbitt, esquire, &c. &c. returned in open court a list of taxable property and polls in the bounds of said company for the year 1827. Whereupon the foregoing lists of taxable property, as returned by the justices appointed to take the same, were recorded in alphabetical order in a book procured by said county for that purpose; and from the said lists so by the said justices returned as aforesaid the clerk made out in his duplicate for the sheriff and collector of the public taxes in and for said county a list of all the lands transmitted by the surveyor and described and so recorded by the clerk as aforesaid, with the amount of taxes arising thereon annexed; and amongst the tracts so by the said clerk listed as aforesaid in his said duplicate was the following tract: One in the name of John Anderson, for six hundred and forty acres, entry No. 120, range seven, section four, taxes five dollars and sixty cents. And at March term, 1828, of Carroll county court, present, the worshipful Nathan Nesbitt, esquire, &c. &c. Be it remembered, that at said term Sion Rogers, esquire, sheriff and collector of the public taxes in and for the county of Carroll, returned in open court a report, which is in the words and figures following, to wit:

"State of Tennessee, Carroll county, March sessions, 1828. I, Sion Rogers, sheriff and collector of the public taxes in and for the county of Carroll, do hereby report to court the following tracts of land, town lots, &c. lying in and within the county aforesaid, as having been listed for the taxes for the year 1827; that the same is liable for the taxes; that the taxes thereon respectively remain due and unpaid, and that the respective owners or claimants thereof have no goods or

JACKSON,
April, 1837.

Anderson
v
Foster.

JACKSON,
April, 1837.

Anderson
v
Petition.

chattels within my county on which I can distrain for said taxes, to wit: (amongst others,) John Anderson, six hundred and forty acres, entry No. 120, range one, section four, taxes five dollars and sixty cents, clerk's fees one dollar and forty cents, sheriff's fees one dollar, printer's fees one dollar and fifty cents."

"Whereas, Sion Rogers, sheriff and collector of the public taxes in and for the county of Carroll for the year 1827, reported to this court the following tracts or parcels of land as having been given in, listed and returned for the public taxes for the year 1827 in said county; that the same lies within the bounds of said county; that the taxes thereon as aforesaid remain due and unpaid, and the owners or claimants thereof have no goods or chattels in his county on which he can distrain for said taxes, to wit: (amongst others,) "John Anderson, six hundred and forty acres, entry No. 120, range one, section four, taxes five dollars and sixty cents, clerk's fees one dollar and forty cents, sheriff's fees one dollar, printer's fees one dollar and fifty cents."

"Whereupon it is considered by the court that judgment be and is hereby entered against the aforesaid tracts of land in the name of the State of Tennessee, for the sums severally annexed to each, being the amount of taxes, costs and charges due thereon for the year 1827; and it is ordered by the court that said tracts of land, or so much thereof as shall be of value sufficient of each of them to satisfy the taxes, costs and charges annexed to them severally, be sold as the law directs. Whereupon an order of sale issued to Sion Rogers, sheriff and collector of the public taxes for the county of Carroll, in the words and figures following, to wit:

"State of Tennessee, Carroll county, March sessions, 1828. To the sheriff of Carroll county, greeting: You are hereby commanded to execute and return the following order and judgment of sale according to law. [Here follows the preceding judgment of sale.]

"Signed: A copy, teste, Edmund Gwin, clerk of Carroll county court. Issued 6th May, 1828."

"Pursuant to the above judgment and order of sale, I, Sion Rogers, sheriff and collector of the public taxes for said coun.

ty of Carroll, will expose to public sale at the court-house of said county, in the town of Huntingdon, on the first Monday of November, 1828, or the succeeding day, between the hours of ten o'clock in the forenoon and sun-set, the foregoing tracts of land, or so much thereof of each as will be sufficient to satisfy the tax, costs and charges severally due thereon, unless previously paid.

JACKSON,
April, 1837.

Anderson
v
Pattch.

(Signed.)

SION ROGERS,

May 12th, 1828.

Sheriff of Carroll county."

"Endorsed: 'Came to hand May 12, 1829, and advertised in the West-Tennessean, a public paper printed in the town of Paris, in the Western District of the State of Tennessee, and the Nashville Republican and State Gazette, a public paper printed in the town of Nashville and State aforesaid, to be sold the first Monday in November next, and succeeding day; said advertisements to be published and declared in each of the foregoing papers respectively ninety days previous to the day of sale, as by the statute in such case made and provided.

SION ROGERS, Sheriff of Carroll county.'

"Endorsed also: 'A list of land sold for taxes for 1827 on the first Monday in November, 1828, and to whom sold: (amongst others,) John Anderson, six hundred and forty acres, entry No. 120, range one, section four, taxes five dollars and sixty cents, clerk's fee one dollar and forty cents, sheriff's fee one dollar, printer's fee one dollar and fifty cents. Sold to John Owen.'

"I, Sion Rogers, sheriff in and for the county of Carroll, do hereby certify that the foregoing tracts of land, &c. were duly and lawfully published ninety days, agreeable to the statutes in said case made and provided, as heretofore in this order of sale specified and set forth; and that on the first Monday in November, 1828, and the succeeding day, they were offered for sale, and that so many of the foregoing tracts of land as were annexed to those persons' names were then and there, at the time of the sale aforesaid, openly and publicly struck off to each and every of the individuals respectively whose names are annexed, they being the lowest bidders, agreeable to the law in such cases made and provided; and that the tracts of land specified in the foregoing

JACKSON,
April, 1837.

Anderson
v
Peterson.

order of sale to which no names are annexed have not been sold, no person bidding therefor. This 9th day of March, 1839. SION ROGERS, Sheriff of Carroll county."

The defendants then offered to read a deed from Sion Rogers, sheriff and collector, to John Owen, but it was objected to on the ground that its calls did not cover the land in controversy; the objection was sustained and the deed rejected. The defendants then introduced and read to the jury a deed from Neely, the sheriff of Carroll county, successor to Rogers, for the land in controversy, to John Owen, the purchaser at the tax sale, reciting the proceedings in regard to the levy of the tax, the reporting of the land for the taxes, the judgment of the county court, and sale by Rogers to Owen, and conveying to him, in virtue of the office of sheriff and collector of the public taxes, all the right, title and claim that John Anderson had in and to the premises. The defendants also proved that the notice of sale was given according to law.

Judge Martin charged the jury, amongst other things, that if they found that the plaintiff's grant covered the land in controversy (the possession being admitted) and the identity of the land covered by the grant and sheriff's deed, the plaintiff would be entitled to a recovery unless his title was divested by the judgment of the county court of Carroll ordering the said land to be sold for the taxes, and the subsequent sale thereof by Rogers, the sheriff, to Owen; that in order to make such judgment and sale effectual to convey the title of Anderson to Owen it should appear that the court in rendering the judgment had jurisdiction; that three things should appear in the record and proceedings of the county court to show jurisdiction: first, that the land lay in the county of Carroll; second, that the taxes were due and unpaid; third, that the owner of the land had no personal goods and chattels in the county which the sheriff could seize for the satisfaction of the taxes. He further charged them that these facts did appear in the record of the proceedings of the county court of Carroll, that such judgment and sale and deed of sheriff and collector did vest Owen with the title to the premises in dispute.

The jury rendered a verdict for the defendants, and a mo-

tion for a new trial being overruled the plaintiff appealed in error.

JACKSON,
April, 1837.

Anderson
v
Patton.

This case was argued by Messrs. Martin, M'Clanahan and M'Campbell, for the plaintiff in error, and by Messrs. Totten, M'Kernan and Geo. S. Yerger, for the defendants. The reporter however has not been able to procure any of the labored arguments which were addressed to the court on the occasion.

REESE, J. delivered the opinion of the court.

In two important propositions on the subject of tax sales, when collaterally investigated, all the leading cases in our State agree: first, that it is necessary to the validity of the judgment of condemnation that the grounds of fact upon which the jurisdiction rests should be set forth in such judgment; and secondly, that these grounds of fact necessary to maintain the jurisdiction being shown or averred, the truth of these grounds or the evidence to establish them need not be shown. As a principle upon which to maintain the first proposition, some of the cases found themselves upon the limited and inferior jurisdiction of the county court and the summary and *ex parte* character of the proceedings in tax sales; while to maintain the second proposition, some of the judges appear to deny the proper application of the above principle to tax sale proceedings, and call to the support of such second proposition the principle that the jurisdiction is exclusive and the proceeding *in rem*.

Both these propositions appear in the following extract from the opinion of the court in the case of *M'Carrol vs. Weeks*, 2 Ten. Rep. 219: "The ground of jurisdiction is afforded to the county court by the existence of two facts: first, that the property taxed is situated in the county; secondly, that its owner is delinquent in discharging the taxes on it agreeably to law. When the court see these two facts spread upon the record it is all that it is necessary for it to see with a view to the legality of a judgment for taxes. In support of a judgment of competent jurisdiction, all directory requisites of the law are presumed to have been complied with, and this presumption attaches as well to the judg-

JACKSON,
April, 1837.

Anderson
v
Fallon.

ments, of inferior or limited courts as of those proceeding, according to the course of the common law; in the latter a want of jurisdiction is never presumed. In a court of limited powers the reverse of this proposition holds." So also these propositions are asserted and maintained, as well by the opinions of the court as by that of the dissenting judge, in the case of *Hamilton vs. Burum*, 3 Yer. Rep. 155. In that case the court say: "If the judgment show upon its face the facts necessary to give it validity, it would not be necessary, in a trial of this sort, to go behind that judgment to show the evidence upon which it was founded." So also the dissenting judge: "The court need only state the facts conferring jurisdiction without stating the evidence of the facts." We do not understand that with regard to these two propositions there was any difference of views between the majority of the court and the dissenting member. The court say, "several facts must appear on the record in order to give validity to such sale;" that "the facts which give jurisdiction are: that the land lies in the county, that the sum due for the taxes remain unpaid, and that there was no personal property that could be distrained for the payment." The court indeed, in another place, say, "it is not only necessary that the judgment should recite the facts upon which the jurisdiction of the court depends, but those facts must be recited as coming from the sources appointed by law to communicate them." By this we do not understand the court as meaning that the county court should "show the evidence upon which their jurisdiction was founded," for we have already seen that they assert the contrary; but we understand them as meaning that if the county court, in their judgment, omit to assume the facts upon which their jurisdiction rests, or themselves to state their existence, but instead thereof allege that they have been communicated to them by some officer or agent of the public, then the public must have trusted such officer or agent to make to them the communication, or their jurisdiction will not appear. From the correctness of this principle there must be few indeed who could not hesitate to dissent. We think it correct, and the only question before us is, whether it was properly applied in

the case of *Hamilton vs. Burum*, for if so, it properly applies in this case also, which is identical.

JACKSON,
April, 1839.

Anderson
v
Pattin.

The 11th section of the act of 1813, ch. 98, points out the manner in which justices shall return lists of real estate, and, among other things, it provides that they shall show its situation as being in the county, and its more minute locality. The 16th section of that act requires of the sheriff, when land has been so listed and returned by the justices and the taxes are not paid] and there is no personal property upon which to make distress, that he should report these facts to the court, that is, the non-payment of taxes and the want of personal property; the other facts, the existence of the land in the county, and its locality, constituted a portion of the justices report which must have been already made. It is obvious that the third section of the act of 1819 does not enlarge the powers or duties of the sheriff beyond those which were given or imposed by the 16th section of the act of 1813. The 16th section of the latter act contains the substance of what he is required to report by the terms of the 3d section of the act 1819, which requires of him, when performing that duty, that he should pursue as nearly as may be the form which is given for his report by the 1st section of the act of 1819. It follows that as by the 16th section of the act of 1813 the sheriff is not required to report the situation and locality of land which has been listed for taxes and returned by the justices, so neither is he thus required by the 3d section of the act of 1819.

But it is argued that the form of the sheriff's report of land not given in for taxation, set forth in the 1st section of the act of 1819, makes its manifest that the legislature did not require that the report of the sheriff or the judgment of the county court should show the fact as a ground of jurisdiction, that the land is situated within the county. No such statement is said to be contained in the form prescribed, and that to require it would be, by judicial construction, to make an interpolation upon the very terms of the act of assembly. And it is further said, that having been omitted in the section where the form is prescribed, it would be improper to require it in the case provided for in the 3d section. This whole ar-

JACKSON,
April, 1839.

Anderson
v
Patton.

gument is overthrown by a reference to the actual form prescribed, which, like the 11th section of the act of 1813, requires that the situation of the land and its neighborhood, or more minute locality, should be shown, which certainly includes its position or existence within the limits of the county.

But it is said again, that if, in the case before us, the judgment of the county court does not assume the fact that the land lies in the county, nor state it as derived from any one empowered by law to make the communication, still looking behind the judgment, evidence of that fact will be found in the report of the surveyor made conformably to the act of 1821. To this we answer: first, that the report referred to was not a proceeding or evidence in the case or proceeding *in rem*. which resulted in the condemnation and sale of the land in question, the first step of which case was the report of the sheriff; and secondly, if we could look behind the judgment for evidence to sustain it, we could also for evidence to render it invalid, which those who make this argument oppose, and which we think would be wrong.

It has been argued with much labor and ingenuity that the jurisdiction of the county court with relation to tax sales is not of a character so limited and inferior, nor the proceedings summary and *ex parte* in such case, as to make it necessary that the court should, in its judgment, state the grounds upon which its jurisdiction rests. The argument is that the judgment therefore may be liable to be reversed in a superior jurisdiction as erroneous, but not to be considered as void in a collateral proceeding. The result of this argument is that there may never have been a tax sale, which did not vest a good title in the purchaser. Many English authorities have been cited to maintain this argument. We have not felt called upon to investigate how far this argument may seem to derive support from the authorities cited; for if, upon a rigid analysis of them all, it should turn out that our courts, in their decisions upon tax sales, appear to have based themselves not upon the right reasons, still we should regard these tax sale decisions as constituting by themselves a system resting upon its own peculiar grounds and princi-

ples, and we should not, for such cause, think of weakening their force.

As to the particular case of *Hamilton vs. Burum*, the correctness of which we have in this opinion endeavored to maintain, it was determined five years ago, and has no doubt since that time constituted the rule of action and of property on the subject. Deeming as we do all fluctuation in judicial decision as an evil of some magnitude, yet to disregard, under the circumstances, the authority of the case in question, except upon grounds of the most urgent character, would operate an injury as extensive and fatal to the community as in any case which can be imagined. We are all therefore of opinion that the judgment must be reversed and that the cause be remanded to the circuit court for a new trial.

JACKSON,
May, 1834.

Farris
▼
Kilpatrick.

FARRIS vs. KILPATRICK.

The circuit court affirmed the judgment of the county court and gave judgment for forty-one dollars, damages, on affirmance. Defendant appealed in error to the supreme court, where the judgment was again affirmed, and in entering up the judgment the clerk of the supreme court omitted to enter the damages aforesaid: Held, that the court had the power at a subsequent term to correct such mistake and enter judgment for the correct amount.

Jackson, February 23, 1833. This day came the said Ebenezer Kilpatrick, by his attorney, and moved the court to correct an error made in rendering the judgment herein at a former term of this court, but because the court are not advised thereon time is taken to consider of the same until the next term of court.

Jackson, May 13, 1834. Hezekiah Farris, Valentine D. Barry and Edmund D. Tarver, plaintiffs, vs. Ebenezer Kilpatrick, defendant. This day came the said defendant, by his attorney, and the court having had under advisement since the last term the motion herein then made by the defendant to correct a mistake of the clerk of this court in entering the judgment of the court at May term, 1832, between the said parties, affirming the judgment below in all

JACKSON,
April, 1837.

Drutchfield
v
Stewart.

things: for that it seems manifest to the court, from the inspection of the record, that the clerk of this court by mistake omitted to include in the judgment of this court the sum of forty-eight dollars, being the damages given in the circuit court upon the affirmance of the judgment of the county court. It is therefore considered by the court that the said judgment be corrected, and that the said Ebenezer Kilpatrick recover of the said Hezekiah Farris, Valentine D. Barry and Edmund D. Tarver, in addition to the former recovery in this cause, the sum of forty-eight dollars; also the sum of one dollar and six cents, being interest thereon at the rate of twelve and one-half per centum per annum from the day of the rendition of judgment in the circuit court to the day of the rendition of the judgment in this court, together with the further sum of two dollars, being interest at the rate of six per centum per annum from the day of the rendition of the judgment in this court up to the present time; making in the whole the sum of fifty-four dollars and ten cents. It is also considered by the court that the said plaintiff recover of the said defendant their costs herein expended, &c.

CRUTCHFIELD vs. STEWART.

Where the clerk of the supreme court entered up a judgment of affirmance in a cause in which the judgment of the court below should have been reversed, and this appeared from the written opinion the court filed amongst the papers in the cause: Held, that the court had the power, at a subsequent term, to correct the judgment so entered by mistake.

The judgment of the circuit court was in favor of the defendant in error, and there was an appeal in the nature of a writ of error to the April term, 1837, of this court. The parties appeared and the cause was heard by this court at that term, and, upon consideration of the errors assigned, it was considered by this court that there was error in the judgment of the court below, and it was ordered that the same be reversed and that the cause be remanded for a new trial. The opinion of the court was in writing and filed among the records

of the court, as required by law, by which it fully appeared to the court that the judgment was reversed. This fact was also fully admitted by the counsel for defendant in error. The clerk by mistake entered a judgment of affirmance, contrary to the opinion and order of the court.

JACKSON,
April, 1837.

Crutchfield
v
Stewart.

The plaintiff in error at the April term, 1838, moved the court to correct the judgment so entered by mistake, so that the same might be in conformity with the opinion of the court as delivered at the hearing of the cause; or, that said judgment should be vacated and stricken out of the record, and that judgment should be entered in favor of the plaintiff in error, as of the last term of this court.

Totten and McCampbell, for plaintiff, referred to the following authorities to sustain the motion. *Wardell vs. Eden*, 2 Johns. Cases, 121: *Bank of Newburgh vs. Seymour and Smith*, 14 Johns. Rep. 219: *Lee vs. Curtis*, 17 Johns. Rep.: *Lansing vs. Lansing*, 18 Johns. Rep. 502: *Burr vs. Reeves*, 1 Johns. Rep. 507: *Seaman vs. Drake*, 1 Cains' Rep. 9: *Close vs. Gillespie*, 3 Johns. Rep. 526: *Atterbury vs. Smith*, 1 Cains' Rep. 495: *Short vs. Coffin*, 5 Burr. 2730: 1 Salk. 47, 53: *Rees vs. Morgan*, 3 Term Rep. 349: 5 Taunt. 558: 4 Taunt. 875: 1 Taunt. 221: *Usher vs. Dansey*, 4 Maule and Selw. 94: *Tully vs. Sparks*, 2 Ld. Ray. 1570: *Mechanics Bank vs. Minthorn*, 19 Johns. Rep. 245: 3 Bl. Com. on Amendments: *Phelps vs. Ball*, 1 Johns. Cases, 31: *Union Turnpike Company vs. Jenkins*, 1 Cains' Rep. 391, 583: *Clements vs. Walker*, 4 Burr. Rep. 2156.

Per Curiam. Let the judgment be corrected.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE.

KNOXVILLE: JULY TERM, 1839.

PENLAND, *et als.* vs. THE STATE.

Where several persons were jointly indicted and jointly convicted, but separate judgments were rendered against them: Held, that the clerk, in making out the bills of cost, should tax a fee against each defendant for the attorney general.

KNOXVILLE,
July, 1839.
Penland
v
The State.

At the April term, 1838, of the circuit court of Cocke county George Penland, Daniel Evans and George W. Allen were indicted jointly and were convicted of gaming, and judge Anderson fined them each the sum of five dollars; separate judgments were entered therefor against them. The clerk taxed in the bills of cost the sum of ten dollars against each defendant, as tax fees for the attorney general.

At the December term the counsel of the defendants moved the court to correct the bill of costs by striking out all the tax fees except one. This the presiding judge, Anderson, refused to do. The defendants prayed and obtained an appeal in the nature of a writ of error to the supreme court.

Peck, for plaintiffs in error.

Attorney General, for the State.

TURLEY, J. delivered the opinion of the court.

This is an application by the plaintiffs in error for the re-taxation and correction of bills of cost under the following cir-

KNOXVILLE,
July, 1839.

The State
v
Posey.

cumstances: they were jointly indicted for the offence of gaming and jointly convicted, but separate judgments were rendered against them, and in taxing the bills of cost the clerk has allowed separate tax fees against each individual defendant in favor of the attorney general, when it is contended he was only entitled to one, which should have been taxed against all the defendants jointly. The court below refused to alter the bills of cost, and we think correctly.

The act of 1824, ch. 5, sec. 3, provides that whenever any fine or cost shall be rendered in any court against any defendant upon any prosecution under any of the statutes which may be enforced to discourage and suppress gaming, ten dollars shall be taxed in the bill of cost as a fee for the attorney general. The statute we think warrants the mode of taxation adopted by the clerk. Whatever difficulty might have existed if a joint judgment had been rendered against the plaintiffs in error, there can be none in as much as there has been separate judgments against each individually. The judgment of the court below will therefore be affirmed.

THE STATE vs. POSEY.

Where an indictment charged the defendant with unlawfully betting two dollars upon a horse-race with a person to the jurors unknown, which said horse-race was not run upon a path or track made or kept for the purpose of horse-racing: Held, that an indictable offence was charged.

The grand jury of Claiborne county at the May term, 1838, of the circuit court, returned a presentment against Bennet H. Posey, in the following words:

"State of Tennessee, Claiborne county. Circuit court, May term, 1838. The grand jurors of the State of Tennessee, being duly elected, empanelled, sworn and charged for the body of the county of Claiborne aforesaid, upon their oaths present that Bennet H. Posey, late of said county, laborer, heretofore, to wit, upon the 3d day of March, 1838, in said county, unlawfully did bet two dollars with a person to the jurors unknown upon a horse-race, which said horse-

race was not run upon a path or track made or kept for the purpose of horse-racing.

KNOXVILLE,
July, 1839.

The State
v
Posey.

"And the jurors aforesaid, upon their oaths aforesaid, do further present that Bennet H. Posey, late of the said county, upon the year and day last aforesaid, in the county of Claiborne, did bet and wager bank notes, being valuable things, with a person to the jurors unknown, upon said horse-race, which said horse-race was not run upon a track or path made or kept for the purpose of turf-racing, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the State."

The defendant demurred and assigned for cause: 1. That there is no indictable offence charged. 2. That it is not alleged the race was along a public road. 3. That turf-racing is not indictable, and it is not alleged that the race was not on the turf. 4. The first count does not conclude against the form of the statute. 5. Nor against the peace and dignity of the State.

On argument of the demurrer before his honor judge Anderson at September term, 1838, he sustained it, and gave judgment that the defendant go hence, &c. The attorney general, Garrett, appealed in error.

Attorney General, for the State.

S. R. Rodgers, for defendant in error.

GREEN, J. delivered the opinion of the court.

The act of 1820, ch. 5, exempts turf-racing from the penalties inflicted by the statutes against gaming. Match races for short distances not being regarded by sportsmen as turf-racing, the exemption in this act was not considered as extending to such races. The act of 1833, ch. 10, (Comp. Stat. 360,) explanatory of the act of 1820, ch. 5, declares that, "all horse-racing, without regard to the distance which may be run, where the same is run upon a track or path made or kept for the purpose of horse-racing, shall be deemed turf-racing within the meaning of the acts of assembly of this State." This latter act evidently intended to change the law as it stood only as it regards the distance which may

KNOXVILLE,
July, 1839.

The State
v
Long.

be run. It makes races of only a quarter of a mile turf-racing; but it does not exempt them from the penalties of the acts against gaming unless they be run "upon a track or path made or kept for the purpose of horse-racing." The indictment in this case alleges that the race was not run on a "track made or kept for horse-racing;" it is therefore not within the exemption of the act of 1833, and consequently is indictable as though that act had not passed. The legislature never intended to tolerate horse-races gotten up and run at distilleries, grog shops and musters, where the crowds of excited intoxicated persons would render it alike dangerous and demoralizing. Indeed the policy of the exemption of horse-racing from the penalties of the statutes against gaming may in all cases be regarded as questionable; and it is the duty of the courts to construe these statutes so as to suppress the mischief of gaming, and consequently to exempt such only as fall within the express provisions of the law.

Reverse the judgment, and remand the cause for a trial upon its merits.

THE STATE vs. LONG.

In an indictment for murder it is not necessary that it should appear in the caption that the jury were sworn; it is sufficient if it appear in the body of the indictment returned by them that they were duly sworn.

On the 23d day of January, 1837, the grand jury of Sevier county indicted John Long for the wilful, deliberate and premeditated murder of Jane Long, by shooting her with a rifle gun on the — day of —, 1837, in the county of Sevier, State of Tennessee. The venue was changed by the court, by the consent of the defendant and the officer of the government, to the county of Knox, a competent jury not being obtainable in the county of Sevier. He was put upon his trial at the June term, 1837, judge Powell presiding, upon the plea of not guilty, and found guilty of murder in the first degree. A motion for a new trial was made and overruled. A motion was also made to arrest the judg-

ment of the court. This motion was overruled and the defendant sentenced to be hanged on the 11th day of August ensuing at the usual place of execution in the vicinity of the town of Knoxville.

KNOXVILLE,
July, 1839.

The State
v
Long.

The defendant prayed and obtained an appeal from this judgment to the supreme court at Knoxville. The caption to the indictment upon which the cause was decided was in the following words:

"State of Tennessee, Sevier county. Be it remembered, that at a circuit court began and held by the honorable Edward Scott for the county of Sevier, at the court-house in the town of Sevierville, on the fourth Monday in January, 1837, the following proceedings were had, to wit:

"Monday, 23d January, 1837. This day Champion Cowan, high sheriff of Sevier county, returned into open court the State's writ of *venire facias* executed upon the following persons, to wit: George M'Mahon, John Williams, &c. &c. out of whom the following persons, good and lawful men, by the county court appointed and by the sheriff duly summoned, were chosen a grand inquest for the body of the county of Sevier, to wit: George M'Mahon," &c.

The indictment returned by this jury began as follows:

"State of Tennessee, Sevier county. January term circuit court, 1837. The grand jurors for the State aforesaid, being duly summoned, elected, sworn and charged to enquire for the body of the county of Sevier, upon their oath aforesaid present that George Long," &c. &c. charging the offence in the usual form.

John R. Nelson, for the defendant in error.

Attorney General, for the State.

REES, J. delivered the opinion of the court.

The objection to the record of the proceedings in the court below mainly insisted on as constituting a ground for the reversal of the judgment is, that what is technically termed the caption of the indictment does not show that the grand jury had been sworn. Ten years since this question came expressly under the consideration of the supreme court

KNOXVILLE, in the case of *M'Clure vs. The State*, 1 Yerger, 206, was
 July, 1839. elaborately discussed at the bar, and was solemnly deter-
 The State mined by a majority of the judges against the prisoner, and
 v. he was condemned and executed.
 Long.

As the question is one of a character merely technical, and as in this case, and indeed in every case, there must be, from the nature of the thing, a moral certainty that, in point of fact, the jury had been sworn, we would perhaps at the last term of the court, when this case was first argued, have contented ourselves with resting upon the authority of the decision in 1 Yerger's Reports, above referred to, and have affirmed the judgment, if the two judges who concurred in the result of that decision had not so far differed in the grounds upon which their opinion was placed; judge Whyte assuming that the words "empannelled, sworn and charged" did not constitute a portion of the indictment itself, but were parcel of the caption, and judge Catron more correctly contending that those words were a portion of the indictment, but insisting that they being found there their omission in the caption, if material, would be supplied. Anxious that the trial by jury secured by the constitution should not, even in its modes and forms, be by any act of ours violated or impaired, we continued the cause till the present term that it might be again argued, and that we might look into the English authorities referred to by the court in the case of *M'Clure vs. The State*. A reference to the form of captions and to the commencement of indictments, as shown in *Saunders and Wentworth*, will establish that a practice has long since been adopted in our State of incorporating with the commencement of the indictment itself the substantial part of the English captions, that is, adding the "*jurat. et onerat.*" of the English caption to the "*super sacramentum suum*" of their indictments. The English caption, it is said, and perhaps truly, constitutes in the first instance no part of the record below, but it is an historical statement of the clerk prefixed to the record when the cause is sent up. If such, as it seems, be their practice, the record furnished by the indictment, which is received by the court from the jury, that the jury had been sworn, empannelled

and charged as required by law, would be at least of as high verity as a memorandum or historical statement of the clerk. But it was determined in England in the time of Holt by the whole court, in the case of *The King vs. Morgan*, 1 Raymond, 710, that the omission in the caption of the words "sworn and charged" would make no difference, and that it would be good without them. And in a case reported in 3 Salkeld, it is ruled the omission of the word "empannelled" in the caption will not be error. In North Carolina, where the commencement of the indictment does not, as with us, contain the words "empannelled, sworn and charged," but where the English form of commencement is adopted, namely, "The jurors of the State, upon their oath, present," &c. it has been determined in the case of *The State vs. Kimbrough*, 2 Dev. 431, since our case of *M'Clure vs. The State*, that the omission to show in the caption that the jury had been sworn does not constitute error. Earlier cases in the same State, referred to in the case of *M'Clure*, are perhaps stronger. We are therefore of opinion that the result of the decision in the case of *M'Clure vs. The State* was not contrary to principle or inconsistent with adjudged cases and we yield to its authority. Minor objections to the record have been taken; we have duly considered of them; they need not here be enumerated; we are of opinion that none of them are material or can avail the prisoner any thing.

The judgment must be affirmed.

KNOXVILLE,
July, 1839.

The State
v
Long.

KNOXVILLE,
July, 1838.

The State
v
Haggard.

THE STATE vs. HAGGARD.

The penalty of the act of 1820, ch. 11, sec. 1, applies with equal force to violations of the acts of 1827, ch. 20, sec. 1, and 1833, ch. 80, sec. 1; therefore when any officer shall seize and sell for the satisfaction of an execution the only farm horse, mule or yoke of oxen which the head of a family engaged in agriculture may have, he is indictable for a misdemeanor in office.

Where the defendant in the execution has but one farm horse, mule or yoke of oxen, it is not necessary that he should select or set apart such horse, mule or yoke of oxen.

Where he has several he has the right of selection.

The defendant in the execution may waive the benefit of the act, but in the absence of proof it will not be presumed that he does waive it; on the contrary the defendant indicted for violating the statute must prove the waiver.

Robert Haggard, a constable of Roane county, was indicted in the circuit court of that county for a misdemeanor in office, in levying upon and selling a mare, the property of one Henry Boyd. The indictment charges that Haggard was a constable in the county of Roane; that an execution against the property of Henry Boyd came to his hands; that Boyd was the head of a family engaged in agriculture; that he possessed and owned one mare and no other horse beast, mule or yoke of oxen; that said Haggard, constable, levied upon said mare and sold her by virtue of said execution.

The defendant pleaded not guilty to the indictment, and being put upon his trial, a jury of Roane county returned a verdict of guilty against him. The defendant by his counsel moved the court to arrest judgment, which motion prevailed and the judgment was arrested. The attorney general appealed in error to the supreme court.

Attorney General, for the State.

Jarnagin, Churchwell and Lyon, for defendant in error. For defendant it is insisted he is not subject to an indictment for the acts charged, because:

1. The act of 1820, ch. 11, (Caruthers and Nicholson's Dig. 533,) says, "it shall and may be lawful for each individual in this State against whom an execution may issue to select

and set apart one cow," &c. "which article such individual shall be protected in the enjoyment of." This act further provides "if any levying officer shall presume to act in contravention of this act, or attempt to evade the same, it shall be deemed a misdemeanor in office," &c. The bill of indictment does not allege the mare levied upon was selected and set apart by the defendant in the execution; and therefore, if such property had been exempt by the act of 1820, defendant committed no offence by the levy.

KNOXVILLE,
July, 1830.
The State
v
Haggard.

2. The act of 1827, ch. 20, (Caruthers and Nicholson, 534,) says, "it may be lawful for any person in this State against whom an execution may issue to set apart ten barrels of corn," &c. The language of this act deserves notice, because it in express terms grants a privilege to defendant in execution, and does make it a misdemeanor to levy upon the property exempted.

3. The act of 1833, ch. 80, (Caruthers and Nicholson, 535,) is the first act that exempts a farm horse, mule or yoke of oxen, and uses this language: "In addition to the property heretofore exempt from execution by the several acts of the general assembly of this State there shall also be exempt in like manner a farm horse," &c. The 5th section of this act limits the benefit of it to the heads of families, and says not one word about it being a misdemeanor in an officer to levy, &c. An act cannot subject a person to indictment by intendment of law. The injury in this case, if any, was of a private nature, and not the subject of an indictment. *Rex vs. Sermon*, 1 Burrow, 516; *Rex vs. Gill*, 1 Strange, 190; *Castle's case*, Cr. Jac. 643; 1 Russell on Crimes, 54. The judgment of the circuit court should be affirmed.

GREEN, J. delivered the opinion of the court.

By the act of 1833, ch. 80, it is provided that, in addition to the property heretofore exempt from execution by the several acts of the general assembly of the State, there shall also be exempt in like manner, in the hands of a person engaged in agriculture, a plough, &c. and one farm horse, mule or yoke of oxen. The first act upon this subject was passed in 1820, ch. 11, (N. and C. 533,) which, after specifying a

KNOXVILLE,
July, 1839.

The State
v
Haggard.

number of articles to be set apart by each individual against whom an execution might issue, provides that these articles shall be exempt from execution; and that any levying officer who might presume to act in contravention of the act, or attempt to evade the same, shall be deemed guilty of a misdemeanor in office and punished accordingly.

The act of 1827, ch. 20, next came and authorized the setting apart the additional articles of ten barrels of corn and three hundred pounds of bacon or pork, under the regulations and restrictions prescribed by the first section of 1820. Then comes the act of 1833, now under consideration.

In construing these acts of assembly we are to give them that sense they would have if they were but different parts of one act. They are upon the same subject, are based upon the same principles, and each of the subsequent acts refer to the preceding one. Construe them all as but one act, and we cannot doubt but that the property which was exempted from execution by the acts of 1827 and 1833 is also protected by the same penalties which were inflicted by the act of 1820. The subsequent acts do but introduce into the act of 1820 additional articles of property to be exempt from execution; and to these articles the rights and duties of the parties attach, as they are fixed by that act. We think, therefore, that a levying officer who may presume to act in contravention of the act of 1833, or attempt to evade the same, shall be deemed guilty of a misdemeanor in office in like manner as by the act of 1820 he is declared to be guilty.

But it is insisted that this judgment ought to be arrested because the indictment does not allege that the horse, for levying on which the defendant was prosecuted, was selected and set apart by the defendant in the execution, as he is permitted to do by the act of 1820.

The indictment alleges that Boyd, the defendant in the execution, is the head of a family, engaged in agriculture, and owning or possessing no other farm horse, mule or yoke of oxen than the one levied on.

To "select and set apart" means the taking one or more articles from other articles of a like character. But here there was but one farm horse owned by the party, and as the law

exempts one from execution, it would be absurd to make the right of the defendant in the execution depend upon his declaration to the officer that he claimed the benefit of the law. Whether, if there had been several horses, the officer could have taken them all, unless the defendant in the execution had selected and set apart one for himself, is a question we need not now decide. In such case, the right to select and set apart one of several horses, would give the defendant in the execution the right to take the best and most valuable of these animals; but it does not follow that because he may select and set apart, that in case he is absent when the levy is made, or may fail to make such selection from any other cause, he forfeits his right to the benefit of these acts. How this may be it will be time enough to decide when the case may arise.

But it is insisted that as the act was made for the benefit of the defendant in the execution he had a right to waive such benefit, and that it does not appear but that he did so. It is true a party may waive a benefit; but it is not to be presumed that he would do so. If such were the fact, it would be matter of defence, and proof of the fact must come from the defendant. 1 Chitty, 232. The judgment must be reversed; and this court, proceeding to render such judgment as the circuit court should have given, order that the defendant be fined five dollars and pay the costs of prosecution.

KNOXVILLE,
July, 1839.
The State
v
Haggard.

NOTE. This case was recognized and affirmed at the December term, 1839, at Nashville.

REPORTER.

KNOXVILLE,
July, 1839.

EVANS vs. THE STATE.

Evans
v
The State.

A constructive assault, such as besetting the house of another, is not such an assault as is meant by the 52d section of the act of 1829, ch. 23. It must be an actual assault on the person, coupled with the felonious intent, to make out the offence described in that section.

Gray Garrett, attorney general of the 12th solicitorial district, at the instance of Isaac A. Miller, prosecutor, preferred a bill to the grand jury of Sevier county at the August term, 1838, of the circuit court of said county against John Evans for an assault upon said Miller with intent to commit murder in the first degree.

The first count in this bill charged that Evans, on the 6th day of August, 1838, in the town of Sevierville, in the county of Sevier, made a wilful, felonious and premeditated assault upon Isaac A. Miller with intent to commit murder in the first degree.

The second count was in the words following, to wit: "The grand jurors aforesaid, upon their oaths aforesaid, do further present that heretofore, to wit, on the day and year last above mentioned, at Sevierville, in the said county of Sevier, John Evans, late of said county of Sevier, tailor, with force and arms feloniously, wilfully and maliciously did assault one Isaac A. Miller, then and there being in the peace of the State, by then and there in the night time arming himself with a pistol charged with gun-powder and leaden ball and besetting the dwelling house of the said Isaac A. Miller, the said Isaac A. Miller and his family then and there residing and dwelling in said house, with intent him the said Isaac A. Miller feloniously, wilfully, premeditatedly and deliberately and of his malice aforethought then and there to kill and murder in the first degree, to the evil example," &c.

The grand jury found a true bill against the defendant on the whole charge preferred against him. The cause was submitted to a jury, judge Powell presiding, at the same term.

It appeared that the prosecutor, Miller, had a suit pending with one Dermon in the circuit court of Sevier county, and

KNOXVILLE,
July, 1839.

Evans
v
The State.

that Derron had a subpoena served upon John Evans, defendant, commanding him to appear and testify in the cause; that in consequence of this Miller had written to the State of South Carolina and procured by mail the transmission of a record of the conviction of Evans for larceny in stealing a trunk, in which he was sentenced to receive twenty lashes. The contents of the record become public, and the fact of its arrival come to the knowledge of Evans. In some short time thereafter Evans left the country swearing that he would have satisfaction at some time. He was absent some three or four years and returned, calling himself Jones. He arrived in the town of Sevierville in the evening, called at a grocery, got some liquor, and enquired and ascertained the house where Miller and his family resided. He had a pistol, and swore that he intended to have Miller's life. He went to the house of Miller at about the hour of twelve o'clock at night on the 6th August, 1839, and called. Miller's wife got up and asked who was there and what he wanted. He said he was a traveller and wanted to see the gentleman of the house. Miller then got up, and before opening the door asked him his name; he said it was Johnson. Miller recognized his voice, and observed that he knew him and what he wanted. He then sent his negro after a gun. Evans fled. Miller and others pursued and arrested him. Evans drew a pistol, but did not attempt to shoot.

The defendant's counsel requested the judge to charge the jury that a constructive assault by besetting the house was not such an assault as would support a conviction under the statute; but the court was of a different opinion, and charged the jury that if they believed the besetting of the house to have been made with the intent charged in the indictment they would be justified in finding the defendant guilty.

The jury found the defendant guilty, and assessed his imprisonment in the jail and penitentiary house of the State at five years.

A motion was made for a new trial and overruled. A motion was also made in arrest of judgment and overruled. The defendant appealed in error to the supreme court.

KNOXVILLE,
July, 1839.

Smith
v
The State.

Nelson, for plaintiff in error.

Attorney General, for the State.

CHASE, J. delivered the opinion of the court.

The question in the case before us is, whether the felony enacted by the 52d section of the act of 1829, ch. 23, is made out and established in proof by showing a constructive assault or assault in law by besetting the house of another? The section enacts that whoever shall feloniously and with malice aforethought assault any person with intent to commit murder in the first degree, &c. The two consecutive sections, 53 and 54, create felonies for an assault upon the person with no other intent but to commit rape and robbery. As the principal felony in all these cases consists in actual violence and wrong done to the person, so the secondary offence enacted by the statute requires in each instance an actual and personal assault coupled with the felonious intent. The besetting the house of another is an assault in contradistinction to an actual assault, and when done with a felonious purpose merits severe punishment, but it is not the character of assault intended by the 52d section of the act of 1829. The circuit court held the law to be contrary to this opinion; we therefore reverse the judgment and award a new trial.

SMITH vs. THE STATE.

An individual may be put upon his trial upon the presentment of a grand jury instead of an indictment.

Drunkenness is an offence against good morals, and a single act is indictable.

The presentment charged that Robert Smith was, on the 5th March, 1838, unlawfully, openly, publicly and notoriously drunk: Held, that this was an insufficient description of the offence, and that the presentment was bad.

At the June term, 1838, of the circuit court of Knox county, the grand jury returned into open court a presentment against Robert Smith in the following words:

"State of Tennessee, Knox county. June term, circuit court, 1838. The grand jurors for the State aforesaid, being duly summoned, elected, sworn and charged to enquire for the body of the county of Knox aforesaid, upon their oaths and upon the information of Levi M'Cloud, one of their own body, present, that Robert Smith, late of said county, laborer, on the 5th day of March, in the year of our Lord eighteen hundred and thirty-eight, in said county, contriving and intending the morals and manners of the good people of said State to debauch and corrupt, was then and there unlawfully, openly, publicly and notoriously drunk, to the evil example of all others, and against the peace and dignity of the State."

KNOXVILLE,
July, 1839.

Smith
v
The State.

This presentment was signed by all the grand jurors. The defendant moved the court to quash the presentment, which the presiding judge, Scott, refused to do, and overruled the motion. The defendant then pleaded not guilty to the presentment, and was put upon his trial on an issue upon the plea. The jury not being able to agree, a mis-trial was entered by consent of parties, and defendant recognized to appear at the February term succeeding. At the February term the cause was submitted to a jury again, judge Keith presiding. M'Cloud, upon whose information the presentment was returned, was introduced, and testified that he had seen the defendant, Smith, drunk on the day mentioned in the presentment, at an election. He was then questioned as to whether he had ever seen the defendant drunk at any other time within twelve months immediately preceding the finding of the presentment. This question was objected to and overruled. M'Cloud then testified that he had seen him drunk upon another occasion. Other witnesses were introduced by the defendant, who testified that they had seen Smith on the occasion last referred to, and did not think him drunk.

Judge Keith charged the jury that a single act of drunkenness was indictable, and if they were satisfied that he was drunk at either of the times mentioned by the witnesses they should find him guilty. The jury returned a verdict

KNOXVILLE, of guilty, and a motion for a new trial was made and over-
ruled.
July, 1839.

Smith
v
The State.

The defendant then filed reasons in arrest of judgment as follows: 1. There is but one act of drunkenness charged in the presentment, and defendant is not charged with being a common nuisance. 2. The offence is not charged as an offence against public morals. 3. The offence is not charged to have been committed against the public peace.

The motion in arrest of judgment was overruled, and the defendant sentenced to pay a fine of ten dollars and the cost of prosecution. He appealed in error to the supreme court.

Nelson, for defendant in error.

Attorney General, for the State.

GREEN, J. delivered the opinion of the court.

1. It is objected that the defendant was put upon his trial upon the presentment of the grand jury instead of an indictment. This practice has been so long followed in this State that it is now too late to question its legality, although it may not be sanctioned by established principles.

2. It is next insisted that the presentment is bad, because it charges the defendant with one act of drunkenness only. It is laid down in Blackstone's Commentaries that sobriety in public is a duty that every man owes to the community. It is therefore an offence to good morals for a man to be publicly drunk, and for this offence he may be indicted.

3. But it is further insisted that the offence is not sufficiently described in this presentment: and we think this objection is well taken. The facts constituting the offence must be set forth so that a defendant may understand the charge he is called upon to answer. 1 Chit. Cr. L. 231. This must be done with as much certainty as the nature of the case will admit. 1 Chit. Cr. L. 231. We think there is no such description of the offence in this case as would enable the plaintiff in error to defend himself by reason of this conviction, should he be called upon again to answer for the same thing.

For this cause the judgment must be arrested. The difficulty of so describing a single act of drunkenness as to put the party upon his defence and satisfy him of the facts that are to be proved against him is such, that notwithstanding we hold a single act of public and notorious drunkenness to be indictable, we think it always safest to charge the offence as in *The State vs. Tipton*, 2 Yerg. 542. Reverse the judgment.

KNOXVILLE,
July, 1839.

Bennett
v
Baker.

BENNETT vs. BAKER.

Where a jury agrees that each shall specify the amount for which he is willing to return a verdict, and they add up the several sums and return the aggregate as their verdict: Held, that such verdict must be set aside. But where one of the jurors adopted this plan without consulting his fellows, and proposed the result as their verdict, to which they assented, the verdict is good.

Thomas Bennett instituted an action of trespass on the case in the circuit court of Jefferson county on the 3d day of March, 1836, against John Baker. At the April term, 1836, the plaintiff filed his declaration, charging that the defendant had maliciously prosecuted him by State's warrant upon a false charge of arson by burning two houses, the property of said Baker, and that he had been duly acquitted thereof before a justice. The defendant pleaded not guilty, and issue was joined upon this plea. The cause was submitted to a jury of Jefferson county, after repeated continuances, at the April term, 1839, judge R. M. Anderson presiding. The jury rendered a verdict for the plaintiff for the sum of two hundred and seventy-three dollars and fifty-eight cents. The defendant moved the court for a new trial, and exhibited the following affidavit in support of his motion:

"Joseph C. Henderson makes oath that he was one of the jurors who tried the above cause; that the jury differed as to the verdict they should render; some of the jury were for smaller damages than others; and finally one of said jury divided the amount proposed by each by twelve, which resulted in the amount of damages rendered. He further

KNOXVILLE, states that he did not agree to said calculation and verdict, but was deceived in the same.

Bennett
v
Baker.

JOSEPH C. HENDERSON."

The court overruled this motion and rendered a judgment upon the verdict, from which judgment the defendant prayed and obtained an appeal in the nature of a writ of error.

Hynds, for plaintiff in error. 1. If the jury should agree, each, to put down a sum and divide the aggregate amount by twelve, and that the result should be their verdict, a verdict so obtained should be set aside. *Graham on New Trials*, 104-5: *Smith vs. Cheatham*, 3 Cains' Rep. 57: 15 Johnson's Rep. 87: 1 Cowen, 238: 1 Root, 194.

2. The affidavit of a juror will be received to show the manner in which the jury found their verdict. *Crawford vs. State*, 2 Yerger's Rep. 62: *Booby vs. State*, 4 Yerger's Rep. 111.

Peck, for defendant in error.

TURLEY, J. delivered the opinion of the court.

In this cause the plaintiff in error moved the court below for a new trial upon the affidavit of one of the jurors, who swears that the jury differed as to the amount for which a verdict should be returned; that one of the jurors divided the amount proposed by each juror, which resulted in the amount of damages returned, and that he did not agree to the calculation and verdict, and was deceived in the same. The circuit court refused to grant a new trial upon this affidavit, and we think correctly. In the case of *Hudson vs. The State*, 9 Yer. 408, this court held that though the affidavits of jurors may be made the foundation for motions for new trials, yet it is a dangerous practice, and not to be extended beyond the point to which it had been already carried. To grant a new trial upon the affidavit in this case would be, as we think, to go further than any case has yet gone upon this subject. The principle, as settled by the authorities, is, that a jury shall not agree among themselves that each shall specify the amount for which he is willing to

find a verdict, divide the whole by twelve, and return the sum thus produced as the result of their deliberation; because it is in the nature of gambling for a verdict, and places it in the power of one juror to make the amount unreasonably great or small, as he may think proper. But such a case is not made out by this affidavit; it does not appear that the jury agreed to resort to this mode of ascertaining their verdict, but that one of the jury, of his own accord and without consulting his fellows, adopted it and proposed the result as the amount of the verdict, to which they assented. This is very different from the case in which the jury agree in the first instance to abide by this mode of finding a verdict. Here they knew the amount proposed before they agreed to find it, and it thereby became the result of their judgment; there they agreed to find a sum to be ascertained in a particular way, not having any idea what the amount may be. We consider this as nothing more than a proposition by the juror to return the verdict for the specified sum, which was done. *Dana vs. Tucker*, 4 Johns. Reports, 487: *Grenell vs. Philips*, 1 Mass. Rep. 561: *Graham on N. T.* 106. As to that portion of the affidavit in which the juror says that he did not agree to the calculation and verdict, but was deceived, all that is necessary to be observed is, that he, together with his fellow jurors, returned the verdict in open court, and he shall not now be heard to allege any thing to the contrary. The practice would be exceedingly dangerous, necessarily tending in its consequences to corruption and perjury. The judgment will therefore be affirmed.

KNOXVILLE,
July, 1839.

Bennett
v
Baker:

KNOXVILLE,
July, 1839.

HAYS and WIFE vs. HAYS.

Hays
v
Hays.

Hays said to Rebecca H. "You have killed one negro and nearly killed another!" Held, that these words, being capable of two constructions, the one defamatory and the other not so, it should have been left to the jury to have determined whether they were used in the defamatory sense or not; and if the jury had found that they were used in the defamatory sense, imputing a charge of felonious slaying, the court would have so regarded them.

This is an action for words spoken by the defendant of the plaintiff, Rebecca. The words in substance were: "You (meaning the said Rebecca) have killed one negro and nearly killed another." Upon demurrer, the circuit judge was of opinion that the words were not actionable, and gave judgment for the defendant, from which the plaintiff prosecuted an appeal in the nature of a writ of error to this court.

R. J. M'Kinney, for plaintiffs. The word "killing" signifies a voluntary and unlawful killing, and is actionable. Starkie on Slander, 33, 34, 55 and 56: see also page 28. Where words are capable of two constructions, in what sense they were meant is a matter of fact to be decided by the jury. Starkie on Slander, 36: 5 J. R. 211: 6 J. R. 82: 12 J. R. 239: 20 J. R. 351, 356.

The records do not show who appeared for defendant in error.

GREEN, J. delivered the opinion of the court.

This is an action of slander for speaking the words following, viz: "You have killed a negro and nearly killed another." "I would not give a fourpence for it." To the declaration there was a demurrer, which was sustained by the court below on the ground that these words are not actionable. It is true these words do not necessarily impute a charge of feloniously killing, but it is equally clear that they may have been so understood. They are capable, therefore, of two constructions, the one innocent and the other defamatory. It has been long settled that words are not to be understood in *mitiori sensu*, as was formerly the rule; for in that case

as lord Mansfield said in *King vs. Horn*, 1 Cowp. 672, a man might defame in one sense and defend in another. 'The true rule is that words are to be understood in the sense they were calculated to impress on the minds of the hearers. When they are capable of two constructions, in what sense they were used ought to be left to the jury as a matter of fact for their determination; and if the jury find them to have been used in their worst sense, the court will consider them as having been so used. Starkie on Slander, 36. As we think this case falls within these principles, the demurrer should have been overruled and the cause submitted to a jury.

Reverse the judgment and remand the cause for trial in the court below.

KNOXVILLE,
July, 1839.

Humes
v
Mayor, &c.

HUMES and WILLIAMS vs. MAYOR AND ALDERMEN OF
KNOXVILLE.

Humph's
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Every proprietor of land, where not restrained by covenant or by custom, has the entire dominion of the soil and space above and below to any extent he may choose to occupy it; and in this occupation he may use his land according to his own judgment, without being answerable for the consequences to an adjoining owner, unless by such occupation he either intentionally or for want of seasonable care and diligence inflict upon him an injury.

Where the agent of a corporation injures the real estate of an individual, by the authority of the corporation, such corporation is liable for such injuries as natural persons are; but where the Mayor and Aldermen of a town corporation procured a street to be excavated and graded, with a view to the improvement of the street, and in so doing did as little damage as possible, yet the property of certain individuals was injured thereby: Held, that the corporate authorities were not responsible for the consequences.

William Williams and Thomas W. Humes instituted an action of trespass on the case in the circuit court of Knox county on the 30th day of May, 1838, against the Mayor and Aldermen of Knoxville. At the June term, 1838, the plaintiffs filed their declaration, in which they averred that they "at the time of the grievances afterwards mentioned were and still are the owners of a remaining interest in and to a certain lot of ground, with a stable thereupon, situate and being in the town of Knoxville, on Prince street in said city,

KNOXVILLE,
July, 1839.

Humes
v
Mayor, &c.

south-west of the intersection of said street by Main street, and known in the plan of said town as lot No. —, now in the possession and occupation of James Williams, tenant thereof to the said plaintiffs; yet the said plaintiffs, well knowing the premises, but contriving and unjustly intending to injure, prejudice and aggrieve the said plaintiffs in their reversionary interest and estate in the said premises, with the appurtenances, and while the said plaintiffs were so interested as aforesaid, to wit, on the 15th day of May, 1837, and on divers other days and times between that day and the commencement of this suit wrongfully and unjustly, and without leave of and against the will of said plaintiff, did cause the said Prince street, in front of and adjoining to said lot of ground, with the appurtenances thereon, as before described, to be dug down and moved away, so that thereby the foundations of said stable were greatly injured and impaired, and whereby the said plaintiffs were hindered from renting the same as profitably to themselves as they would otherwise have done," &c. &c.

The defendants pleaded: 1. Not guilty. Upon which plea issue was joined. 2. "That by the acts of the legislature of the State of Tennessee the town of Knoxville is an incorporated town, and that the said defendants, by virtue of the powers vested in them as the Mayor and Aldermen of the said town, have the right and power, and had at the time of the alleged grievances in the plaintiff's declaration mentioned, to order and direct the improvements of the public streets in the town of Knoxville, and in virtue of their authority as Mayor and Aldermen and acting as such did cause the said street to be excavated, dug and graded, it being a public street in said town, in order to improve said street, and in so doing did in some measure reduce the said street below the doors and entrances into the said stable in the declaration mentioned, as they lawfully might, which are the grievances mentioned in the plaintiffs' declaration."

The plaintiffs demurred to this plea, and the defendants joined in demurrer.

This demurrer came on for argument before Judge Scott at the December term, 1839, and being heard, the demurrer

was sustained. The issue of fact was submitted to a jury at February term, 1839, judge Keith presiding.

KNOXVILLE,
July, 1839.

Humes
v
Mayor, &c.

It appeared in evidence that one Ethelred Williams was the owner of the lot and stable thereupon situate on Prince street in the town of Knoxville, and that he had made a deed for the same to William Williams, his son, and his daughter, Cornelia, who had intermarried with plaintiff, Humes. It further appeared that James Williams had been in possession of the lot and was in possession of the same at the commencement of the suit, which was used both as a stable and granary, and was of the value of eight hundred dollars, and that it was situated on the street on the outermost verge of plaintiffs' lot.

It further appeared that this street was in a very bad condition, and that some improvement of it being absolutely necessary for the convenience of the public, in the judgment of the Mayor and Aldermen, an order was passed by the board directing an excavation and grading of the street as near at and along the edge of the lot as was necessary to effect the purposes of the public; that in complying with this order, James Park, the duly authorized agent of the corporation, did excavate and grade the street in front of the stable of plaintiffs, leaving eight feet from the street to the timbers of the stable, with the view, as the said Park testified, of doing as little injury as possible to the property of plaintiffs. It also appeared that the ground had been dug down between six and eight feet, and that the stable was most materially injured and its value greatly impaired by the agency of the corporation. It did not however appear that there was any other motive actuating the corporate authorities than the improvement of a public street for the convenience of the inhabitants.

Judge Keith charged the jury, amongst other things, that an action could be sustained against the corporate authorities of a town for injuries done by their agent acting under their direction and authority; that it was not necessary to join the wife of Humes as party plaintiff in the action; that if James Williams was the tenant of plaintiffs, and an injury

KNOXVILLE, was done to their right in remainder, case would be the proper action.

Humes
v
Mayor, &c.

The judge further instructed the jury that the streets and alleys of the town of Knoxville were public highways, and that the repairs and improvements were confided to the Mayor and Aldermen elected according to the act of incorporation, and that they had a right to use the entire streets and alleys, if necessary for public purposes; that if the Mayor and Aldermen ordered that Prince street should be improved by grading, and it became necessary to excavate the ground over which the street passed, and no unnecessary digging was done, and such digging was not done wantonly and maliciously, but that notwithstanding the plaintiffs' lot and stable were injured by such digging by being rendered less accessible and convenient, it would be a damage arising from the peculiar situation of plaintiffs' property, but it would not be such an injury for which damages could be recovered; that if the digging was done to improve the street and no actual trespass was committed, the corporation would not be responsible for consequential damages.

The judge further charged that the Mayor and Aldermen had a right to exercise their discretion in fixing the width of the side-walks for public convenience, and if, from the falling of rain and other natural causes, the side-walks gave way and an inconvenience was experienced by owners of property from that circumstance a recovery could not be had for such consequential damages in this action.

The jury returned a verdict for the defendants. A motion for a new trial being made and overruled the plaintiffs appealed in error to the supreme court.

Crozier and Jarnagin, for plaintiffs in error, cited 2 Scott, 292: Ang. and Ames, 16, 18, 274-5, 207, 208, 219, 220: 7 Mass. Rep. 166, 187, 462: *Yarborough vs. Bank of England*, 16 East: 2 Kent's Com. 338: 6 Mass. Rep. 364: 4 S. and Rawle, 6: 1 Chitty's Pl. 934.

Swan and Alexander, for defendants in error.

TURLEY, J. delivered the opinion of the court.

KNOXVILLE,
July, 1839.

Humes
v
Mayor, &c.

The principle both of the civil and common law applicable to the case under consideration is, "that if a man does what he has a right to do upon his own land, without trespassing upon any law or custom or the title or possession of another, he is not liable to damage for injurious consequences, unless he does it, not for his own advantage, but maliciously; and the damage shall be considered a casualty for which he is not censurable." 12 Mass. 226, case of *Thurston vs. Hancock and others*. This principle is recognised by the supreme court of New York in the case of *Patton vs. Holland*, 17 Johns. 92, where it is said that a person about to erect a house contiguous to another may lawfully sink the foundation of it below that of his neighbor's house, and is not liable for the damages which his neighbor may sustain in consequence of it, provided it was unintentional, and he had used reasonable care and diligence in digging on his own ground to prevent any injury to his neighbor. In *Rolls' Ab.* 965, it is said that "if A, seized in fee of copy-hold estate next adjoining the land of B, erects a new house upon his copy-hold, and a part is built upon the confines next adjoining the land of B, and B afterwards digs his land so near the house of A (but on no part of his land) that the foundation of the house, and even the house itself, fall, yet no action lies for A against B, because it was the folly of A that he built his house so near the land of B, for by his own act he shall not hinder B from the best use of his own land that he can."

From these authorities the necessary conclusion is, that every proprietor of land, where not restrained by covenant or custom, has the entire dominion of the soil and the space above and below to any extent he may choose to occupy it, and in this occupation he may use his land according to his own judgment, without being answerable for the consequences to an adjoining owner, unless by such occupation he either intentionally or for want of reasonable care and diligence inflicts upon him an injury.

To apply this principle to the case under discussion: The corporation of Knoxville is the proprietor of the public

KNOXVILLE,
July, 1839.

Williams
v
Woods.

streets of the town, which are held in trust as easements for the convenience of the citizens. As such proprietor the corporation has the power to grade, M'Adamise, or do any thing else for the improvement of the streets, whereby they may be made to answer the end for which they were designed; and if, in the exercise of this power, the property of any individual shall be rendered less valuable, either by being elevated above or depressed below the common level, it is *damnum absque injuria*, a casualty to which his property is necessarily subject, and for which the corporation is not responsible unless the injury has been inflicted either wantonly or from neglecting to use reasonable diligence and care. Neither of these cases is made out by the proof. The improvement of the street is shown to be highly necessary to the comfort and prosperity of the town, and therefore a duty imposed upon the corporation; the work is proved to have been executed with all care for the rights of the plaintiffs, and as little injury done them as from the nature of the excavation required was practicable.

We are therefore of the opinion that there is no error in the judgment of the court below, and direct its affirmance.

WILLIAMS vs. WOODS.

Williams bought of Woods land, paid a part of the purchase money, took bond for title when the balance should be paid, and died: Held, that the right of the vendor to have the land sold for the payment of the balance of the purchase money was superior to the right of the widow of the vendee to be endowed thereof. In such case, if the land is sold by chancery decree, the purchaser takes it discharged of the right of dower; the widow is entitled, however, to one-third of the surplus produced at the sale during her natural life.

Rachael Williams filed her bill in the chancery court, held at Dandridge for the fifth chancery district in the eastern division of the State, on the 16th day of January, 1838, against Robert and John Woods in *forma pauperis*. This bill charges that complainant, Rachael Williams, was the widow of James Williams, deceased, late of the county of

Cocke; that on the 25th day of January, 1822, her husband, James Williams, purchased one hundred and twenty-four and three-fourth acres of land, lying in the county of Cocke, of a certain John Woods, and said Woods executed to said Williams a bond in the sum of eight hundred and twenty-four dollars, the condition of which was as follows:

KNOXVILLE,
July, 1839.

Williams
v
Woods.

"The condition of the above obligation is such, that the above bound John Woods has on this day bargained and sold, and will give peaceable possession of, one hundred and twenty-four and three-fourth acres of land on the 15th day of February next to the said James Williams, and which is bounded as follows," &c. &c. "Now if the said John Woods doth make or cause to be made a good and sufficient title to the above named tract of land on or before the first day of October next to the said James Williams, his heirs or assigns, then the above obligation to be void, otherwise to remain in full force and virtue.

JOHN WOODS, [L. s.]"

The bill further charges that said Woods, about the time the bond above mentioned was executed, put James Williams in full and peaceable possession of the premises under and by virtue of the agreement of sale; that her deceased husband paid up all the consideration agreed to be paid but a small amount, and whilst in the undisturbed enjoyment of the same he took sick and died intestate, leaving complainant in possession of the land; that complainant and the heirs of Williams, deceased, remained in full possession of the land for several years after his death; and whilst so in possession, that said John Woods filed his bill in the circuit court of Cocke county in 1830, charging that he held a lien upon said land for a supposed balance of the purchase money alleged to be due him. The bill further charges that complainant was not made a party defendant to the bill filed against the heirs; that the land was ordered to be sold for the payment of an alleged balance of the purchase money; that it was sold, and said James Woods became the purchaser for a small consideration, and a final decree was rendered in the case divesting complainant and the heirs at law of James Williams of all title to the premises, and vesting the same

KNOXVILLE,
July, 1839.

Williams
v
Woods.

in said John Woods; and that she was subsequently turned out of possession of the land. The bill further charges that John Woods took possession of said tract of land and had held possession of the same for a term of years and still continued to hold a portion thereof, the balance being held by one Robert Woods, but under what claim of right complainant did not know. The bill charges that complainant was entitled to dower in the said tract of land in which her husband died seized and possessed of an equitable interest. The bill further alleges that she had filed her petition to obtain her dower rights allowed, but that the said petition was dismissed because the rights of the parties could not be tried in as full and as ample manner as by bill in equity.

The bill prays that dower may be allotted to her, and that the damages due her for the detention of her dower might be set off against any balance which might be ascertained to be due said Woods.

At the June term, 1838, John Woods filed his demurrer to the plaintiff's bill, and argument being heard thereupon, the demurrer was overruled and leave was given the respondent till the next term to answer the bill.

John Woods filed his answer on the 21st August, 1838. He admits the contract of sale set forth in the complainant's bill, and alleges that Williams died intestate and utterly insolvent, leaving a portion of the purchase money unpaid, and that he was forced to file his bill in the chancery court for the purpose of obtaining a sale of the land for the unpaid purchase money; that the land was decreed to be sold and was sold for the payment of the sum due respondent, and that he became the purchaser and obtained quiet possession of the premises according to law.

Respondent further alleges that it was not true that complainant was no party to the bill filed; that she was a party, if not in her own right, at least as the guardian of her children; that she had knowledge of the institution of the suit, of its progress, of the final decree, of the sale of said land, and purchase by respondent, and that she stood in a situation to have asserted her pretended right to dower if she

desired so to do, but that no such right was set up. Respondent urged said decree of sale in bar of her present bill.

Respondent further alleges that all the matters of law and fact involved in this case were fully before the court discussed, and adjudicated in the petition filed by the complainant to have her dower allowed her, and the petition was dismissed upon final hearing; that complainant appealed from such judgment of dismissal to the supreme court, where the question was fully examined and the decree of the circuit court of law and equity affirmed.*

The respondent exhibited in his answer a transcript of the proceedings had on the bill filed by him for the sale of the land, from which it appeared that the land was purchased by Williams for the sum of two hundred and twelve dollars, in

KNOXVILLE,
July, 1839.

Williams
v
Woods.

*The following is the opinion of the court in the case referred to delivered by JUDGE REESE:

"This is a petition for dower, and the defendants, who are not the heirs at law of the husband, are alone made parties defendant. John Woods, in 1823, sold the land to Williams, the husband, and retaining the legal title as security for the purchase money, gave his bond to convey. In 1830, Williams having died, and a portion of the consideration being unpaid and the legal title remaining in the vendor, he filed his bill against the heirs at law of Williams, and made the petitioner, who was guardian for those of them in their minority, a party defendant in that character. He obtained a decree to subject the land to sale for the satisfaction of his debt. It was sold, he became the purchaser, and the sale was confirmed by the court. Upon this state of the case the petition for dower was dismissed in the circuit court, and we think properly. For although the widow is in general entitled, as against creditors, to dower in the lands of which her husband died seized and possessed, yet she is not so entitled as against those creditors who have a specific lien upon the land. Even if a deed had been made to Williams, and he had died seized of the legal estate, the vendor's lien upon the land for the balance of the purchase money would have been asserted as well against the widow's claim for dower as against the title of the heirs, and without the vendor being required to look in the first instance to the personal representatives; and therefore, *a fortiori*, where the vendor retains the legal title to make sure the payment of the purchase money. The widow, if she claims dower, must, with the heirs, contribute her share of the purchase money, or if the heirs should fail to pay, she may satisfy the vendor, and thereby entitle herself to dower and to the lien of the vendor against the heirs for that share or portion of the purchase money which they were subject to pay. But to attain these objects it would have been necessary we think that she should have filed her bill in chancery in due time, as well against the heirs as against the vendor. For this, and for other reasons which might be suggested, we think the judgment of the circuit court must be affirmed.

KNOXVILLE,
July, 1839.

Williams

v

Woods.

Tennessee bank notes, and that the sum of one hundred and ninety-six dollars remained due and unpaid at his death, and that the court decreed that if the said sum of one hundred and ninety-six dollars was not paid in four months from the date of the decree that the land should be sold for the satisfaction of the same; that the money was not paid, and the land was sold and Woods became the purchaser. Respondent also made an exhibit of the petition, answer and opinion of the supreme court thereupon, mentioned in the bill of complainant, and contended that the whole matter of law and fact involved in the present bill was adjudicated and settled in that case.

At the December term, 1838, complainant filed her replication to the answer of defendant Woods. At the June term, 1839, the cause was set for hearing, and being heard, the chancellor, being of opinion that complainant was not entitled to relief, dismissed the bill. Complainant appealed *in forma pauperis* to the supreme court.

Peck, for complainant. No one is bound by a judgment or decree where that person has not in regular form been made a party. Mrs. Williams was not a party to the first record in the circuit court of Cocke county. She is not bound by that decree, for there is none touching her. Her right to dower does not depend upon what the heirs may or may not do. If the heirs had sold the land it would not deprive her of the right the law cast upon her. So if the law sell the right of the heirs, she, not being a party, is not excluded. Dower is favored; and in most cases creditors are not preferred to the widow. But admit that a lien exists in this case: can she not discharge the lien and be let into the right? She may call in the heirs to assist her, but this is a right she may waive. She has done so. If liable for all, and she will take the burden, whose business is it? The petition did not reach her case. The point raised in this bill was not in that. In that case she did not offer to discharge the lien. The court say she should have done so. Not having done it, the justice of the case could not be reached.

Whether a judgment is conclusive or not, and especially

in equity, must depend upon the whole case; if the merits have not been reached because of some defect in the form of the proceeding, the form of the proceeding may be altered so as to attain the justice of the case. Surely the court would let the party in in another form to come at the merits and do justice.

KNOXVILLE,
July, 1839.

Williams
v
Woods.

The question in this case is, is the answer showing the proceedings upon the petition conclusive? In the form relied upon it is insisted it is not conclusive. It must be by plea in form, and it must be certain to every intent and sworn to in the form prescribed. To insist upon it in the answer as if pleaded only brings it to the notice of the court, but does not make it more conclusive than any other part of the answer. The plea to be good must cover the whole ground in bar; it cannot reach part and miss the rest, yet still be good; it is in fact no plea unless it cover the whole. The answer relies upon the decree in the circuit court as being good to defeat the dower. In the frame of this bill that is not true in point of fact. The plea, as to the petition and judgment dismissing it, is bad, and the case stands upon the offer to discharge the lien. If the plea is bad in bar, then the complainant is not excluded. 4 John. Ch. Ca. 140: 7 John. Ch. Ca. 1, 166, 286, 300. The defence is attempted to be put upon technicalities; then confine the pleader to them: if wrong he loses the benefit of his objection. The application is in time both for the dower and to discharge the lien. Woods has had no possession that bars. The application for dower and discharge of the lien came together. The right is favored; the whole justice of the case can be reached; there is no plea standing in the way. The bill, therefore, was improperly dismissed.

M'Kinney, for defendants.

TURLEY, J. delivered the opinion of the court.

This bill is filed by the complainant against the defendants to assert her right of dower in a tract of land of one hundred and twenty-four and three-fourth acres, under the following circumstances:

KNOXVILLE,
July, 1839.

Williams
v
Woods.

On the 25th day of January, 1822, John Woods sold the tract of land in controversy to James Williams, the husband of the complainant, and the purchase money not being paid, the title was reserved by the vendor, and a bond to convey executed to the vendee. The vendee died before the purchase money was paid, and the vendor was compelled to resort to a court of chancery to enforce a payment of his debt by a sale of the land. A decree for that purpose was obtained, and the land was sold and bought in by the vendee at a price which left no surplus fund, so far as this court can see. The complainant was no party to the proceedings, the bill having been filed against the heirs at law of James Williams; and it is now contended that the widow is endowable of an equitable estate, and that not having been made a party to the proceedings by virtue of which the land was sold, her rights were not divested by the sale, but that she may still charge the estate in the hands of the purchaser under the decree with dower interest.

Where land is sold, and the title is reserved as a security for the payment of the purchase money, the right of the vendor to have it so applied is superior to the right of the widow of the vendee to be endowed thereof. Her right to be endowed of the land in kind depends upon the payment of the purchase money. If this be not done, and the land is sold under a decree of court, the purchaser takes it discharged from the right of dower, and the widow is turned over to the surplus fund, (if the land should sell for more than will pay the debt which is a charge upon it,) of which she is entitled to one-third part during her natural life as dower.

From this view it is clearly seen that the complainant in this case has no right to charge the land in the hands of the defendants, but must seek for the surplus fund, if there be any, and look to it alone for redress.

The chancellor was therefore right in dismissing the bill, and we affirm his decree.

KNOXVILLE,
July, 1839.

ROSS vs. CARTER and BREWER.

Ross
v
Carter.

A note in the following words, "Due Lincoln and Berry sixteen hundred pounds of bar iron, delivered at Elizabethton: 29th May, 1836," is not a contract falling within the provisions of the act of 1807, ch. 95, as the time and place of payment are both specified. The measure of damages is the value of iron at the date of the note.

Where it was agreed that four cents per pound should be the price at which the iron should be estimated in the discharge of a written contract, but such agreement was not inserted in the written agreement or note of the party: Held, that no agreement not contained in the written instrument could properly have been given in evidence to bind the parties; the only use that could have been made of the fact, that in the dealings between the parties a particular price had been uniformly agreed upon, would have been to consider it as evidence of value.

On the 4th of March, 1839, William Ross instituted an action of trespass on the case in the name of James P. M'Dowel, Francis A. M'Corkle and James H. Jones, partners in trade, assignees of Lincoln and Berry, for his own use, against Alfred M. Carter and Benjamin Brewer, in the circuit court of Greene, on the following instrument:

"Due Lincoln and Berry sixteen hundred pounds of good merchantable assorted bar iron, delivered at Elizabethton, which will be paid in full of dues and demands to this date. Given under our hands this 29th day of May, 1836.

A. M. CARTER & B. BREWER."

They declared in assumpsit, and the defendant pleaded non-assumpsit, and issue was thereupon joined. The case was submitted on the proof to a jury at the June term, 1839, judge Powell presiding.

The plaintiff read a letter from John Brewer, dated "Elizabethton, 16th November, 1836," in which he acknowledges the justice of the debt, declares it ought to have been paid before that time, that it should be paid in a short time, either in cash or iron, but that it was impossible for him to pay it at that time, as he had not the iron and could not get it. This letter was addressed to M'Dowel, at that time the owner of the note, in the hand-writing of Brewer, and was written in reply to a letter from M'Dowel, demanding

KNOXVILLE, the iron. Iron was, at the date of the letter, of the value
July, 1839. of five cents per pound in Elizabethton.

Ross
v
Carter.

Rhea, a witness on behalf of the plaintiff, stated that on the 21st day of February, 1837, he went to Elizabethton as the agent of the plaintiff, Ross, to demand and receive the iron mentioned in the note, having in his possession the note sued on; that he presented it at the residence of the defendants and demanded payment of the iron therein mentioned in behalf of the plaintiff, and that defendants refused payment, assigning as a reason the increase in the price of iron.

Lincoln, one of the original payees of the note, proved the assignment of the note to M'Dowel, Jones and M'Corkle, and that in the trading between the houses of Lincoln and Berry and Carter and Brewer, iron was uniformly, in 1836, estimated at four cents per pound.

M'Gaughey testified that Brewer had stated to him, in reference to the note sued on, that it was understood, at the time it was executed, that the iron was to be valued at four cents per pound.

The defendants introduced some three or four witnesses, who all testified that the market price of iron in 1836 in Elizabethton was three cents per pound.

The defendants' counsel insisted that as demand or notice was necessary to entitle the plaintiff to maintain this action, and as delivery of the iron had been refused when demanded, the measure of damages should be the price of iron at the time of such demand and refusal. The counsel for defendants also requested the court to charge the jury that if the parties themselves had fixed and agreed on the price at which the iron in said obligation mentioned should be rated, that then the price so fixed on should be the measure of damages, if the court should be of the opinion that the plaintiff was not entitled to the price of iron at the time of the demand; but judge Powell refused so to charge the jury, but stated to them that the note sued on in this action was to be considered as due from the day of its date, and that no demand or notice was necessary to maintain the action, it not being a contract within the meaning of the act of 1807, ch. 95, and that the measure of damages

should be the value of iron at Elizabethton at the date of the note, and the jury should determine from the proof what was the usual price of iron at Elizabethton at the date of the note, and be governed by that and not the highest or lowest price that iron could be sold for at that time. The jury found the issue in favor of the plaintiff, and assessed his damages at two hundred and twelve dollars and eighty-five cents. A motion for a new trial being made by the plaintiff and overruled, he appealed in error to the supreme court.

KNOXVILLE,
July, 1839.

Ross
v
Carter.

Robert J. McKinney, for plaintiff in error. The question in this cause is, what is the just and proper measure of damages? The general rule as to damages is the value of the article at the time of the breach of the contract.

1. It is insisted for the plaintiff, that this is a contract within the act of 1807, ch. 95; hence the plaintiff had no right of action, nor were the defendants bound to deliver the iron sued for in this case until demanded, and consequently there was no breach until demand and refusal to deliver the iron. If this argument is well founded, does it not follow that the plaintiff is entitled to recover the value of iron at the time of such demand and refusal? To test the soundness of this argument: suppose that before demand or notice the price of iron had fallen to two cents, might not the defendants have insisted that as they were not bound to deliver the iron till demanded and had been guilty of no breach of their contract, and as the delay had been the plaintiff's own fault, he should bear the loss, and should only receive the value of the iron at the time of demand or breach of the contract?

2. It is contended for the plaintiff that, as the value of the iron was fixed on by the parties at the time of executing the contract, it should have been left to the jury to adopt, as the measure of damages, the value thus agreed on, if they deemed it proper to do so.

3. The value of an article at the time it should have been delivered is not always a just measure of damages; nor is this rule universal. "When the price is paid in advance the vendee is not confined in measuring his damages to the

KNOXVILLE,
July, 1839.

Ross
v
Carter.

value of the goods at the time they should have been delivered, but may, if he brings his suit within a reasonable time, recover according to the highest price at any time between the period for delivery and the day of trial." 7 Cowen's R. 681; Chitty on Con. 131-2. "The value of a chattel at the time of its conversion is not always the rule of damages; for when it is uncertain or fluctuating the plaintiff may receive the price of it at the time he calls on the defendant to restore it."

Lucky, for defendants in error. The first question that arises is, is the instrument sued on a property contract within the meaning of the act of 1807, ch. 95? For the defendants it is insisted that both the time and place of payment are definitely fixed by the instrument itself; that the language used in the instrument, "Due Lincoln and Berry so much iron, this 16th May, 1836, in Elizabethton," is equivalent and synonymous to a promise on that day to pay them that amount of iron in Elizabethton. When the whole instrument is looked to no other rational construction can be given to it. Suppose it had been written thus: "On this 16th day of May, 1836, at Elizabethton, I promise to pay Lincoln and Berry sixteen hundred pounds of iron," &c. could there be any doubt but that the time was designated in the instrument, and that no demand or notice was necessary? yet this is the substance of the language used. It is conceded to the plaintiff, that if the instrument had been for money or bank notes the debt would have been due then, and interest would have accrued from its date.

2. What is the true measure of damages? The uniform course of decision in Tennessee has been, that if property is not delivered on the day it is due the true measure of damages is the value of the article at the time and place of its delivery. Any other rule would be unsatisfactory, and would leave the measure of damages to the vague and uncertain caprice of either witnesses or jurors. The rule contended for by the defendants is definite, easily understood, and about which there can be no uncertainty. It is conceived that the value of any personal property on the day it

is bargained to be delivered, together with legal interest thereon, is the most equitable general rule by which to ascertain the damages where there is a failure of compliance. Cook's R. 447: 2 Burr. 1171: 2 Hay. 334. There is nothing in the case before the court to take it out of the general rule and the uniform practice of the country from the time of the decision in Cook's Reports to the present. And even supposing a demand or notice was necessary, before suit was brought, still the measure of damages would have been the price of iron at the date of the note; the demand or notice is only necessary to convert the property demanded into a cash debt.

KNOXVILLE,
July, 1839.

Ross
v
Carter.

GREEN, J. delivered the opinion of the court.

1. It is contended by the plaintiff in error that the instrument upon which his action is founded does not fix a time for the payment of the iron; and therefore, there was no breach until the demand was made, and consequently, the measure of damages should have been the price of iron at the date of the demand. It is true the instrument does not in express words stipulate a day for the payment or delivery of the iron, but it acknowledges on the 26th day of May, 1838, that the iron was then due; and being the date of the instrument, it follows that it was due or payable the moment the contract was made. If the contract had been for money there is no question but that it would have been payable immediately, and that an action might have been maintained upon it in case of non-payment the next day. It is not perceived how the application of this language to the payment of iron instead of money can change its meaning. We think, therefore, that the day of the date of this instrument was the time specified in it for the payment of the iron; and as Elizabethton is specified as the place where it was to be delivered, it is not a contract falling within the operation of the act of 1807, ch. 95.

2. The next question is, what is the measure of damages? Unquestionably the value of the iron at the time the defendants agreed to deliver it, with interest on that amount. This has been the general principle upon which our courts

KNOXVILLE, have uniformly acted, and there is nothing peculiar in this case to prevent the application of the general rule.

Smith
v
Story.

3. As to the refusal of the court to instruct the jury that if the parties had agreed on the price at which the iron should be rated the price so fixed should be the measure of damages, we think there is no error. No agreement not contained in the written instrument could properly have been given in evidence to bind the parties. The only use that could have been made of the fact, that in the dealings between the two parties a particular price had uniformly been fixed, would have been to consider it as evidence of the value. This proof was before the jury for their consideration, and there is nothing in the charge of the court preventing them from giving to it all the weight to which it was entitled as evidence affecting the value. We think there is no error in the judgment, and therefore affirm it.

SMITH vs. STORY.

An attachment bill under the act of 1836, ch. 43, sec. 1, will not lie against a citizen who may be absent in another State, and who may have formed a determination to remove and made all preparations necessary to a removal. There must be an actual change of domicil already effected or he will not be regarded as a non-resident within the meaning of the act.

On the 19th day of September, 1837, Charles Smith filed his bill in the chancery court at Dandridge, in the eastern division of the State, against William C. Story. This bill charges that defendant, Story, executed his bill single binding himself to pay to complainant, for value received of him, on the 24th day of December, 1836, the sum of three hundred and seventy-eight dollars and forty cents, due one month after the date of said instrument; and that on the 1st day of January, 1837, defendant, Story, paid to complainant sixty-five dollars; and that the balance of said note and interest thereupon remained due and unpaid.

The bill charges that complainant was a resident of the county of Cocke, and that the defendant "at the time of said

transaction was considered a resident of Cocke county also, though for a considerable time preceding that he had been in the habit of occasionally making trips to the south, and sometimes remained absent for a considerable length of time;" but that shortly after said transaction said Story left the State, intending, as he informed complainant and others, to return in a short time, but that he did not do so; and that complainant had been informed that said Story had purchased a tract of land in the State of Georgia and taken up his residence in that State, and that from the information he had received he had reason to believe that said Story did not intend to return again to the State of Tennessee, but that he designed residing permanently in the State of Georgia: by reason whereof complainant was likely, without the aid of a court of equity, to be delayed in the collection of his debt. The bill further charges that the defendant had left several negroes and other personal property in the State of Tennessee. The bill prayed that an attachment might issue, by virtue of the provisions of the act of assembly passed in the year 1836, ch. 43, to the sheriff of Cocke county, commanding him to seize the said negroes and keep them safely to abide by such decree as the court should render in the premises, unless bond and security should be given according to law for their forthcoming; and that a decree should be rendered subjecting them to the satisfaction of his debt. On the 16th September, 1837, this bill was sworn to and subscribed by complainant before chancellor Bramlitt, who ordered the clerk of the chancery court at Dandridge to issue the attachment in conformity with the prayer of the bill, directing the negroes to be returned to defendant, Smith, upon his giving bond and security in the sum of six hundred dollars, conditioned for the forthcoming of the negroes to meet the decree of the court in the premises.

On the 19th of September the clerk issued the writ to the sheriff of Cocke county. This attachment came to the hands of the sheriff, who returned that he could find no property of defendant in the county. An *alias* attachment was issued at the October term, on motion of complainant's solicitor, which was levied upon two negro slaves, the property

KNOXVILLE,
July, 1839.

Smith
v
Story.

KNOXVILLE,
July, 1839.

Smith
v
Story.

of William C. Story, and bond and security taken for the forthcoming of them at the final hearing of the cause. At the same term an order of publication was directed by the court, upon the allegations in complainant's bill, to be made in the Knoxville Register, that the defendant appear at the next term and answer, &c.

At the June term, 1838, the defendant, William C. Story, appeared in proper person and filed his plea to the complainant's bill, in which he prays that the complainant's bill should be abated, "because this defendant avers that at the time of the giving of said note, when the same became due, and at the time of the filing of complainant's bill, he was, continued to be, and still is, a citizen of the State of Tennessee, to wit, of Cocke county, and amenable to common law process; and at no time, neither at the time of giving said bond nor at the time it became due and payable nor at the time of the filing of this bill, was this defendant a citizen of the State of Georgia." The defendant therefore alleged in his said plea that the circuit court of Cocke county had jurisdiction of the cause, and that the chancery court had not. This plea was verified by the affidavit of defendant.

At the December term, 1838, the following order was made: "The defendant's plea in abatement having been, on motion of complainant's solicitor, set down for argument, and the same having been argued and the premises by the chancellor fully considered, it is ordered, adjudged and decreed that said plea be disallowed, and that the defendant, within two months from this date, file a full and sufficient answer to complainant's bill," so as not to delay hearing at the next term.

Story filed his answer on the 3d day of June, 1839. He stated that he was, at the time of filing his answer, and had been for forty years before that time, a citizen of the county of Cocke; that it was true he had been occasionally absent from the State of Tennessee for some considerable length of time, as he had been engaged in the business of driving hogs to the Georgia markets for sale. He stated that it was true that he had purchased a small tract of land (forty acres) in Georgia, but that he had given horses and hogs for it and had

sold it again. He stated that during this whole period his family resided within two miles of the county seat of the county of Cocke, upon a tract of two thousand acres of land belonging to him, upon which he had eight negroes, household furniture and other personal property at the time of the issuance of the attachment. He charges that his actual residence had been at all times in the county of Cocke, and that this fact was well known to complainant.

KNOXVILLE,
July, 1839.

Smith
v
Story.

Complainant filed a replication to this answer, and proofs were taken by complainant and defendant.

William B. Jones testified that he saw Story in Georgia in August, 1837; that he had then been in that State about nine months; he purchased a tract of land, raised a crop on it in 1837, was engaged in working a gold mine, and avowed his determination to remove to the State of Georgia and reside there. When witness returned to Tennessee he made known these facts to complainant and others.

George Easterly testified that Story left Cocke county about Christmas, in 1836; that he returned and remained a few days in May, 1837, and left again for Georgia. He saw him there in August, 1837, and did not think he returned before the first of the year 1838; Story told him he had purchased a tract of land; showed him his growing crop; avowed his intention to remove to Georgia; showed him the place where he intended to locate his dwelling house. He further stated that Smith sent the note, for the collection of which the bill was filed, by him to Georgia; that he presented it to Story, who informed him that he would be in Cocke county before the fall circuit court began and pay the note; and that Story did not comply with his promise. He further testified that Story was much involved in debt in Cocke county, and supposed to be insolvent in 1837 and 1838.

The defendant read the depositions of several persons, who proved substantially that in 1836 and 1837 Story was engaged in trading in hogs and bacon in Georgia, and that he was laboring to collect his debts; that his family and property had remained in the county of Cocke; that he always regarded that place as his home, though he had purchased land in Geor-

KNOXVILLE,
July, 1839.

Smith
v
Story.

gia and had avowed his determination to remove there; that his family and his creditors had become somewhat alarmed at his long absence, and that a portion of his property had been sold under a judicial attachment.

The cause came on for final hearing on the proofs before chancellor Williams at the June term, 1839. His honor being of the opinion that the pleadings and proofs showed that "at the time of the filing of this bill, and for some time previous thereto, the defendant had left the State of Tennessee; that he had purchased a farm in the State of Georgia and was cultivating it, and had declared his determination to reside in said State, and had done other acts clearly indicating his purpose and determination to make his residence there, and that such was the belief and understanding of his creditors and others in the neighborhood of his former residence, and that in point of fact he was a resident of the State of Georgia," ordered, adjudged and decreed that if the defendant did not within ten days from that date pay the complainant the sum of three hundred and fifty-nine dollars and forty-one cents, the amount of his debt and interest, the clerk should proceed to sell one or both of said slaves, if necessary, and satisfy the debt.

The defendant prayed and obtained an appeal to the supreme court from this decree.

R. J. McKinney, for complainant.

Peck, for defendant.

RESE, J. delivered the opinion of the court.

This is an attachment bill filed against the defendant under the provisions of the first section of the act of 1836, ch. 43, as a non-resident debtor, and not under those of the third section as an absconding debtor. The only question arising upon the pleadings and the proof is one of fact with reference to the jurisdiction of the court: that is, whether the defendant was at the time of filing the bill a non-resident? The proof makes it clear that however he may have spoken of a purpose thereafter to change his residence, or

made preparations and arrangements tending to that end, still his residence and domicile were not in fact changed, but continued in the county of Cocke in this State. The court, therefore, had no jurisdiction to pronounce a decree, and the decree rendered must be reversed. But, as the situation and conduct of the defendant might well have induced the complainant, without the imputation of fault, to adopt the course he did, let the parties each pay one half of the costs.

KNOXVILLE,
July, 1839.

Mims
v
Mims.

MIMS vs. MIMS.

Where a bill is filed by mortgagee against mortgagor for sale of mortgaged premises for satisfaction of debt secured by such mortgage, and the deed was not registered as the law required, it is not necessary to allege in the bill that there were no creditors or subsequent purchaser, nor is it necessary to make such creditors or subsequent purchaser parties to the bill, as they would not be affected by any decree rendered in the premises.

Where A mortgaged lands first to Scruggs and afterwards to Mims, and Mims filed his bill to foreclose the mortgage: Held, that Scruggs, not being affected in any degree by the decree, would not be a necessary party, nor is it necessary for the widow of the mortgagor to be made a party for the same reason.

Paulina C. Mims, Eliza E. Mims, Caliph G. Mims, Almira C. Mims and Albert W. Mims, minor children and heirs at law of Albert Mims, deceased, residents of the county of Cocke, by their guardian, Samuel M. Hughes, filed their bill in the chancery court at Greeneville, in the eastern division, against Robert W. Pullam, administrator of Alfred Mims, deceased, against the heirs at law of said Alfred, to wit, Milly E., William C., G. M., Drury H., Mary, Moses and Aaron J. Mims, minors, and their guardian, Casper Easterly, for the purpose of procuring the foreclosure of a deed of mortgage.

This bill charges that their father, Albert Mims, departed this life in the county of Cocke, at his residence, intestate, leaving the complainants his heirs at law and distributees of his estate; that some time previous to his death a certain Alfred Mims, his brother, being indebted to a certain James

KNOXVILLE,
July, 1839.

Mims
v
Mims.

Scruggs a large sum of money, mortgaged to said Scruggs two different tracts of land, one lying in the county of Greene the other in the county of Cocke, for the purpose of securing the payment of the before-mentioned indebtedness; that the time for the payment of the money mentioned in the mortgage having elapsed, and being unpaid, the said Albert, at the pressing instance and request of said Alfred, did pay and discharge the said mortgage money with the express agreement that he should be substituted to all the rights of said Scruggs, and he did accordingly take an assignment of said mortgage to himself as a security for the re-payment of the money advanced.

The bill charges that for the better security of the money so advanced, the said Alfred, on the 12th day of February, 1834, executed and delivered to Albert, deceased, a deed of mortgage, in the following words:

"This indenture, made and entered into between Alfred Mims of the one part, and Albert Mims of the other part, witnesseth: that for and in consideration of the sum of thirteen hundred dollars in hand paid by the said Albert to the said Alfred Mims, the receipt whereof is hereby acknowledged, the said Alfred hath bargained, sold and conveyed, and by these presents do bargain, sell, convey and mortgage to said Albert Mims, his heirs, &c. two tracts of land, one lying in the county of Greene, on Nolachucky river, beginning, &c. &c. and containing seventy-seven and one-half acres, the other in the county of Cocke, beginning, &c. &c. and containing seventy acres, to have and to hold to him, the said Mims, his heirs and assigns, forever, in mortgage for the following purposes, to wit: if the said Alfred Mims shall refund to the said Albert Mims, or his proper representatives, the sum of thirteen hundred dollars in the following payments, with lawful interest: three hundred dollars on the 12th day of February, 1835; five hundred dollars on the 12th day of February, 1836; five hundred dollars on the 12th day of February, 1837; then this deed of mortgage to be null and void, and the two above tracts to revert to said Alfred. But if the said Alfred or his representative shall fail to

pay the above thirteen hundred dollars, or any part thereof, with interest, then this deed of mortgage to stand in full force.

KNOXVILLE,
July, 1839.

"Test: J. EASTERLY,

ALFRED MIMS."

JAMES SCRUGGS, JR."

Mims
v
Mims.

The bill further charges that their father died intestate, without having the said mortgage proven and registered, and that said Alfred administered upon his estate, and became by appointment of the county court of Cocke county the guardian of complainants; that thereupon he took in his possession the said deed of mortgage, with the other valuable papers of the deceased, and kept them in his possession till his death, without having the mortgage registered, as it was his duty to have done, the witness to the deed residing a short distance from him; that the complainants did not know of the existence of the said deed till after the death of said Alfred Mims, they being then and still minors.

The bill charges that so soon as they came to the knowledge of the existence of said deed they caused it to be proved and registered.

The bill further states that complainants had discovered certain alleged payments endorsed on the back of said mortgage, to wit, the sum of three hundred and eighteen dollars on the 12th February, 1835, the other purporting the payment of the interest due on the same up to the 18th March, 1837, a period of about nine months only before his death, and that complainants could neither admit nor deny the fact in regard to those alleged payments.

The bill further charges that Alfred Mims died intestate, and that Casper Easterly was appointed their guardian and Robert W. Pullam the administrator of the estate of the deceased.

The bill prays that the heirs, the guardian and administrator be made parties, and an account be taken and the mortgaged premises be decreed to be sold for the payment of the sum ascertained to be due, and the interest thereupon.

E. Easterly filed his answer on the 16th August, 1838. He admits the payment of the debt due to Scruggs by the ancestor of complainants, but denies that the mortgage was assigned, and alleges that a new mortgage was taken, as set

KNOXVILLE,
July, 1839.

Mims
v
Mims.

forth in the bill. He alleges that the mortgage was not registered during the lifetime of complainants' ancestor; that it came to the hands of his widow at his death; that she held it till two years after the appointment of Alfred Mims, deceased, to the administration of the estate, had expired, when the county court appointing commissioners to settle with Mims, a settlement was made, and the mortgage being regarded as evidence of debt only and as personal assets, the same was liquidated and returned to the mortgagor as discharged; that the payments endorsed on the mortgage were in fact made before the death of the mortgagor, but were not endorsed on the deed by him. He alleged that this mortgage was not registered till the 10th day of January, 1838, after it had been liquidated and discharged, and insisted that said deed was void as to subsequent creditors.

On the 12th day of August, 1838, Robert W. Pullam, administrator, filed his answer. He stated that he had filed his bill in the chancery court suggesting the insolvency of the estate of Albert Mims, transferring the administration of the assets to chancery, and praying a sale of the real estate, and that such suit was still pending. He alleged that he knew nothing in regard to the allegations of the bill.

Hughes filed a general replication to these answers. Some depositions were taken and read to sustain the allegations of the answer in regard to the payments alleged to have been made on the mortgage. The cause came on to be heard at the November term, 1838, before chancellor Williams, who, being of the opinion that complainants were entitled to have the mortgage set up and made effectual and to have the amount due on the mortgage discharged by a sale of the mortgaged premises, and not being satisfied from the proof introduced that the credits claimed in the answers should be allowed, directed the clerk and master to take an account and report the sum due, allowing all just credits, and to report the proofs introduced. The clerk and master allowed the credit of three hundred dollars, and reported the balance due on the mortgage to be twelve hundred and fifty-five dollars on the 13th May, 1839.

At the May term, 1839, the cause came on for final hearing. The complainants excepted to the report allowing the credit. The chancellor sustained the exception, and he being of the opinion that no satisfactory proof of the payment had been made as alleged, and that there was due to complainants the sum of seventeen hundred and nine dollars and fifty cents, with the interest which should accrue, decreed that unless the representative of Alfred Mims should pay to the guardian of complainants the above sum, with interest, in four months from the date of the decree, the clerk and master should expose to public sale the mortgaged property, after giving forty days notice according to law, and apply the proceeds of the sale in satisfaction of the debt, and report to the next term what he had done in the premises.

KNOXVILLE,
July, 1839.

Mims
v
Mims.

The defendant prayed and obtained an appeal to the supreme court.

R. J. McKinney, for complainants. 1. As between the parties to a deed registration is not essential to its validity. 10 Yerg. 146.

2. The omission to have the mortgage registered in this case will be relieved against in equity. 1 Story's Eq. 179.

J. A. McKinney and Arnold, for the defendants. 1. The mortgage deed having in the life time of the mortgagee been held up for more than twelve months after its execution and delivery without probate and registration, it is void as to judgment creditors and subsequent purchasers, and the bill to foreclose should charge that there were none such.

2. The settlement with the committee of the county court, in which the sum due upon the mortgage was accounted for and tendered, and for which sum security was subsequently given when the said Alfred was appointed guardian to complainants, was a complete satisfaction of said mortgage deed, and it was thereby cancelled.

3. The widow of the mortgagor, who is entitled to dower, should have been made a party.

4. Scruggs, the first mortgagee, and in whom the legal title is vested, should have been made a party.

KNOXVILLE,
July, 1839.

TURLEY, J. delivered the opinion of the court.

Mims
v
Mims.

This bill is filed to foreclose a mortgage for two tracts of land, executed on the 12th day of February, 1834, by Alfred Mims to Albert Mims, which mortgage was not registered until the 9th day of January, 1838, after the death of both mortgagor and mortgagee. A decree to foreclose is resisted on several grounds:

1. It is contended, that because the deed was not registered, as the law requires, it is void as against creditors and subsequent purchasers without notice; and that inasmuch as there may be those in existence who are not before the court, no decree ought to be rendered. To this the answer is that if there be such persons there is no necessity to make them parties to the bill. They claim in different rights, have no connection whatever with this transaction, and no decree that may be made in the present case can in any wise affect them.

2. It is said that it appears that previous to the mortgage from Alfred Mims to Albert Mims the same lands were mortgaged to James Scruggs, and that he ought therefore to have been made a party. To this objection the same answer which is given to the first applies with equal force. He is no party to this mortgage, and a decree between the present complainants and defendants as to him will be *res inter alios acta*, and therefore have no effect whatever upon his rights.

3. It is contended that inasmuch as the widow of the mortgagor is entitled to dower in the equity of redemption, she ought to have been made a party. We do not think this necessary. "Upon the death of the husband," as this court has said in the case of *Thompson vs. Stacy*, 10 Yerger, 494, "his real estate descends to his heirs at law, who have the undivided seizin till an assignment of dower has been made, and who alone can bring suits to recover the possession and for injuries done to the estate." If, then, the wife cannot be a party plaintiff she need not be a party defendant; and this principle applies as well to suits in equity concerning equitable rights to real estate as it does to suits at law. Whatever rights a widow may have may always be enforced against

the tenant of the freehold, if it be to the land itself, and against the trustee of the fund if it be to a portion of money received for lands of which she would have been endowable had they remained in kind.

KNOXVILLE,
July, 1839.
Perry
v
Pearson.

These are the material objections taken to the decree of the chancellor. Inasmuch as none of them are available, the decree will be affirmed.

PERRY vs. PEARSON and ANDERSON.

Where the reading of a deposition is rejected at the hearing of a cause in equity, and no bill of exceptions is taken and filed showing the grounds of such rejection, and the cause is taken up by appeal, the deposition rejected is not a part of the record, and its contents cannot be regarded in the supreme court.

Where there is a parol condition made to a written contract, which is understood by the parties, but by fraud or mistake not inserted in the contract, the court will reform the contract according to the intent and understanding of the parties; but such parol condition must be sustained by full, clear and unequivocal proof, and in the absence of such proof the written contract will be adjudged to contain the true intent of the parties.

On the 11th day of February, 1833, Abel Pearson deposited in the office of the clerk of the federal district court for the eastern district of Tennessee the title of a book in the following words: "An analysis of the principles of divine government, &c. a dissertation on the prophecies in reference to the rise and fall of the beast, the cleansing of the sanctuary, the beginning and duration of the millenium," &c. to which he claimed a right and obtained a certificate according to law from the clerk of said court.

A limited edition of this theological work was published, and the author, Pearson, believing that if it was re-published in a more creditable edition the sale would be profitable, proposed a sale of the copy-right to Silas Perry and James Perry. After some negotiation they entered into an agreement on the 20th day of May, 1834. This agreement witnesses that "the said Pearson hath bargained and agreed with the said Perrys, and by these presents doth bargain, grant and transfer to them, the said Perrys, the full liberty and right

KNOXVILLE,
July, 1839.

Perry
v
Pearson.

of printing and publishing in Cincinnati, in the State of Ohio, four thousand copies of a book entitled "An analysis of the principles of divine government," &c. (the right whereof said Pearson claims as author, according to the act of Congress of the United States in such case made and provided,) and also the right of using and selling to others to be used the said four thousand copies in any of the States west of the Blue Ridge. And in consideration of and for which right the said Perrys do bargain and agree to pay unto the said Pearson or his heirs the sum of one thousand dollars on or before the first day of September, 1835; and it is agreed that they will pay it all or a part sooner if they can. And it is further agreed that the said Perrys shall have the full liberty and right of printing and publishing at the same time and place any number they please over and above the aforesaid four thousand copies, and use, and sell them to others to be used, in any of the States west of the Blue Ridge; and the said Perrys agree and promise to pay to the said Pearson, or his heirs or assigns, twenty-five cents for each copy by them so printed and published, on or before the first day of March, 1836. And it is further agreed that the said Perrys shall have the liberty and right of printing and publishing and selling as aforesaid any number of copies of the said book from time to time for two years from the above date; and the said Pearson is not to have any others printed any where else in that time west of the Blue Ridge; and the said Perrys agree and promise to pay to said Pearson, his heirs or assigns, twenty-five cents apiece for each copy so printed and published by them within six months after such printing and publishing the same."

This was signed and sealed by Abel Pearson; and by Silas Perry for himself and for his brother, James Perry, who was not present at the time of the execution of the contract.

Silas and James Perry issued a prospectus to obtain subscribers to a new edition of this work, applauding the work in the highest terms of eulogy, and having attached thereto the names of various clergymen, expressing their approbation of the character and contents of the proposed publication. They however failed, after some exertions, to obtain

more than about one hundred subscribers to the work, and abandoned the publication in despair. Pearson demanded the money of the Perrys after the time of payment of the one thousand dollars had arrived. Silas Perry insisted that it was understood by them at the time of the execution of the agreement that if one thousand good subscribers could not be obtained the agreement should be null and void, and refused to pay. On the 22d day of April, 1837, Pearson assigned the article of agreement to Thomas A. Anderson for value received of him, and Anderson instituted an action of covenant in the circuit court of Monroe county against Silas and James Perry. To this action James Perry pleaded *non est factum*, and thereupon a *noli prosequi* was entered against him, and a judgment was rendered on the 16th day of May, 1838, against Silas Perry on the article for the sum of one thousand one hundred and fifty-two dollars and fifty cents and costs.

KNOXVILLE,
July, 1839.

Perry
v
Pearson:

On the 31st July, 1838, Silas Perry filed his bill in the chancery court at Madisonville, in the eastern division of the State, against Thomas A. Anderson and Abel Pearson. This bill sets forth the article of agreement above alluded to, and charges that when the contract was made it was distinctly understood between the said Silas and Pearson that if a thousand good and solvent subscribers could not be obtained that the publication was not to proceed, and the contract was to be null and void; that it was not then reduced to writing; that it was agreed that Pearson should draw the article of agreement, he being a "man of holy vocation" and "part of a lawyer." The bill charges that when Pearson presented the bond or contract complainant objected to signing it, because it did not contain the agreement between the parties, to wit, the condition that complainant and his brother were to pay the money and publish upon the condition alone that they could obtain one thousand solvent subscribers; that Pearson admitted that such was the contract and such was their understanding, but said he had read law, and was part of a lawyer, and that such a condition inserted in the bond or instrument would make it void and of no effect; that such conditions were not inserted in such instruments;

KNOXVILLE,
July, 1839.

Perry
v
Pearson.

that it made no difference about them if they were understood between the parties; and that in the present instance it was of no consequence, as he and complainant understood each other, and the instrument would be of no effect if they did not get the subscribers. The bill further charges that, under the influence of the belief of these statements, he signed the article above set forth, and also signed the name of his brother, James Perry, then absent in the State of North Carolina; that when James Perry returned he would not agree to be bound by the contract signed by complainant, but that he would engage in the publication of the work if the thousand subscribers could be obtained, and not otherwise. The bill charges that they accordingly issued a prospectus and employed an agent to procure subscribers, but could get only one hundred, and that they accordingly abandoned the publication, and notified Pearson of the fact.

The bill charges that the assignment to Anderson was merely colorable and made for the purpose of carrying into effect more fully the fraud upon complainant, and prays that the article of agreement might be declared void, and that Anderson and Pearson might be perpetually enjoined from enforcing the judgment at law.

On the 17th day of December, 1838, Anderson filed his answer. He declared that he gave full value for the article of agreement in the course of trade, and expressed his conviction that the judgment was just and ought to be enforced.

On the same day Pearson filed his answer. He stated that the sale of the right of publishing the work was absolute, as specified in the article of agreement; "that not one word was said to him or by him about getting a thousand subscribers as a condition of fulfilling the agreement; that no such proposition was ever made to him or by him; that he never thought of making such, and that nothing had occurred to induce complainant to think so."

He further stated that James Perry on his return home was fully satisfied with the arrangement made, and that one Samuel Blackburn wished to become a party with complainant in the publication, and that complainant was willing that he should come in, but that the money was to be paid before

Blackburn could be able (as he stated) to make the payment. He denied all fraud, and alleged that he had transferred the article of agreement to Anderson for a full and valuable consideration on the day of the transfer endorsed thereupon.

KNOXVILLE,
July, 1839.

Perry
v
Pearson.

Complainant filed a general replication to the answers of Anderson and Pearson.

Three depositions were taken in this case, all by complainant. Murphy proved that his services were engaged to get subscribers to the work, that he was a minister of the gospel, and that he made due exertions and could get an inconsiderable number only.

James Perry stated that he was not present at the first conversation that took place between Silas Perry and Pearson, nor at the time the written contract was signed by them; that he was present however at a conversation which did take place after the first conversation and before the signing of the deed; that they then agreed that if one thousand subscribers could be obtained he would print and publish four thousand copies of the work, for which Pearson was to receive twenty-five cents for each copy, or one thousand dollars for the whole number, and that the obtaining the one thousand subscribers was an absolute condition to the contract; that he left the neighborhood, and on his return he found the prospectus in the printing office at Madisonville, and saw for the first time his name signed to the article of agreement, and finding no condition in the contract he denounced the contract and refused to be bound by it. He stated that his brother then informed him that the condition was understood between him and Pearson; that he then took a prospectus and went to the State of Ohio and back and used great exertions to get subscribers, but utterly failing to get any, he advised his brother to go and "lift the instrument."

Perry further stated that he was present at the time when Blackburn wished to become a party to the contract; that Blackburn objected to going into the contract, as it did not embrace the contract as he had understood it. He heard on that occasion his brother insist that it was part of the contract that if one thousand subscribers were not obtained the contract was not to stand. He did not hear the entire con-

KNOXVILLE,
July, 1839.

Perry
v
Pearson.

versation which took place on the occasion referred to, but Pearson did not in his presence deny the contract as it had been stated by Silas Perry.

Blackburn stated that Perry had informed him that he had made a contract with Pearson for the publication of four thousand copies of "Pearson's Analysis," and desired witness to go into partnership with him; that he informed him that if one thousand good subscribers could be got the publication was to go on, if not, then the contract was at an end; that he professed a willingness to become a party to the contract, and according to agreement, he, Pearson and Perry met at Silas Perry's. The article was read; witness then took out Silas Perry and told him that the contract was not written as he had stated to him it was; that by that bond he would have the money to pay whether he got the subscribers or not; that Perry appeared alarmed. Witness then told him that if Pearson would give another bond or instrument showing the contract he would be willing to go into it. Pearson and Perry then had some conversation, the purport of which he did not distinctly recollect, but he recollected that Perry asked Pearson whether, in the event that the subscribers could not be obtained, the bond was to be binding? that Pearson evaded answering this question, but stated that the contract was written as they had agreed; that the matter was understood between them; that the subscribers could be got, &c.; that Perry then stated that as his brother and Mr. Blackburn did not like it, it might some day come against him or his heirs; that Pearson replied, "go on and get the subscribers and there would be no difficulty about it." Witness then told Pearson he would be willing to go into the contract if he would put the condition, that it was not to be binding without the subscribers could be got, on another piece of paper; Pearson smiled and said he was a "part of a lawyer, and never saw a contract on two pieces of paper," and, in reference to an interlineation which witness suggested, Pearson objected that it "would not stand in law."

Blackburn stated, on cross-examination, that Pearson never did admit in his presence that the contract as reduced to writing was not the true contract.

At the March term, 1839, the cause came on for final hearing. The following entry was then made:

KNOXVILLE,
July, 1839.

Perry
v
Pearson.

"On the hearing of this cause defendants objected to the reading of the deposition of James Perry, on the ground that he was interested, which objection was sustained by the court and the deposition rejected."

No bill of exceptions was filed to the opinion of the chancellor in rejecting Perry's deposition, nor any other notice taken of the same than the entry as above set forth.

Chancellor Williams, being of the opinion that the proof sustained the allegations in the bill of complainants, decreed a perpetual injunction against the judgment, and ordered that defendants pay the costs of the suits at law and in equity.

Defendants appealed from this decree to the supreme court.

Jarnagin and Lyon, for complainant. The proof makes out a case of misrepresentation and fraud upon the part of respondent, Pearson, for which a court of equity will afford relief. 1 Story's Eq. 166-7, note 1. Misrepresentation of the law and undue influence afford ground for relief. Story, 140, 141, note. Confidence and trust reposed, and the relative character of the two parties, afford ground for relief. Story, 224. Fraud and damage coupled together entitle the party injured to relief in a court of justice. 7 John. Ch. Rep. 201. A court of equity will also reform a written contract where material stipulations have been added or omitted through fraud or mistake. 1 Story, 166; 1 Cox's Rep. 502, 404-5, *Osmend vs. Fitzroy*; 3 P. Williams, 129; 2 P. Williams, 240; 2 John. Ch. 585. Cases of plain mistake or misrepresentation, though not the effect of fraud, are entitled to the interference of the court. Newland on Con. 432, ch. 28; 1 John. Ch. Rep. 606; 2 Ad. 203; Vesey, 317.

Hynds, for defendants. The answer of Pearson fully and unequivocally denies that any condition constituted a part of the sale; alleges that it was an absolute sale, and the written contract was precisely what the contract was. There is no proof in the cause which contradicts the answer. The only deposition which contradicts the answer is that of com-

KNOXVILLE,
July, 1839.

Perry
v
Pearson.

plainant's brother. This deposition was rejected by the court, and is improperly in the record. No exception was taken in the court below to the rejection of the testimony. *Barrow vs. Rhineland*, 1 John. Ch. Rep. 550. But if it were before the court the answer is only contradicted by one witness, and the other testimony in the cause sustains it.

1. It is sustained by the instrument itself. The law is well settled that a written contract is supposed to contain the whole contract of the parties, and if by mistake or fraud a part is left out, it requires clear and irrefragible testimony to show it. 1 Story's Eq. sec. 152, 153, 154 and 157: 2 John. Ch. Rep. 274, 285, 597, 630: 3 Brown's Ch. Rep. 192.

2. The answer is sustained by the deposition of Blackburn. There is then no evidence to satisfy the rule that one witness, and circumstances proved by others, are required to outweigh an answer.

3. But if it were proved there could be no relief; equity would not reform a contract for a misrepresentation of the law. 1 Story, 191, sec. 191, 111 and 113, where a similar case is put. Here the contract was signed deliberately.

4. A written agreement merges all parol negotiations, &c. and a parol agreement cannot be set up as being made at the same time. 1 John. Ch. Rep. 273, *Benedict vs. Linch*: Roscoe's Evidence, 9: *Dawson vs. Walker*, 1 Stark. 361: 1 Peters, 13.

Per Curiam. Upon the hearing of this cause in the chancery court the complainant introduced and offered to read in evidence the deposition of James Perry, which was objected to on the ground that the witness was interested in the matter in controversy, which objection was sustained and the testimony rejected, and there was no bill of exceptions to the opinion of the chancellor, by which the deposition is made a part of the record.

1. The first question presented for consideration is, whether this court can have the deposition of said James Perry read as evidence in the cause? We think not. All depositions and other papers which are read as evidence before the chancellor constitute a part of the record in the case, and

will be heard by the supreme court upon an appeal; but those which upon motion are rejected as incompetent and illegal, and not therefore to be read, cannot be taken into consideration here unless a bill of exceptions has made them a part of the record. Depositions are frequently rejected for matter arising upon parol evidence; the interest of witnesses is often thus proved, and unless a bill of exceptions be filed, it is impossible for the court above to know for what cause the deposition was excluded.

2. But secondly, if this deposition could be read, does it, in connection with the other testimony in the cause, establish the position contended for by the complainant, that there was a condition to his contract by which he was not held to be liable for the payment of the thousand dollars unless one thousand subscribers for the book contracted for could be procured, and which was, by the fraud or mistake of the defendant, not inserted in the written evidence thereof? We think not; for although equity will relieve against omissions in written contracts, whether they have occurred by mistake or fraud, and will hear parol proof to establish the omission, yet the evidence must be clear and strong, proving it to the entire satisfaction of the court. *Gillespie vs. Moore*, 2 John. C. R. 585, and the authorities there cited. Such is not the proof under consideration. James Perry, if we could hear his testimony, was not present when the contract was reduced to writing, and therefore cannot know whether any of its terms were omitted or not. The testimony of Samuel Blackburn proves nothing but that there was an impression on his mind that there was a condition to the contract, though he admits that he could not understand the true contract, and that he never heard Pearson admit that there was a condition, but that he, on the contrary, always contended that he had drawn the instrument of writing embracing the contract as made. We would violate every principle of law upon this subject were we, upon this proof, to set up the condition to the contract, and that against the express denial of the defendant in his answer. We cannot do it.

We therefore, though with reluctance, reverse the decree of the chancellor and dismiss the bill.

KNOXVILLE,
July, 1839.

Perry
v
Pearson.

KNOXVILLE,
July, 1839.

MURPHEY vs. GOIN.

Murphey
v
Goin.

P. Murphey gave his covenant to Goin to re-deliver a hired slave at the end of twelve months, and at the time of the delivery an execution against W. Murphey was levied upon him: Held, that the delivery was a valid delivery and a discharge of the covenant, notwithstanding the subsisting levy.

On the 5th day of February, 1834, Levi Goin hired a negro boy to Pleasant Murphey for the period of twelve months from that date, by an article of agreement, under seal; Murphey bound himself to pay Goin fifteen dollars for the hire, clothe the boy during the time, and to re-deliver him at the expiration of the hiring.

On the 7th day of February, 1835, in the town of Tazewell, in the county of Claiborne, Murphey pointed to the negro (he being in the possession of no one at the time) and said to Goin, "there is your slave, go and take him." Goin went to him and took him by the arm. About the same time, C. B. Bullard, sheriff of Claiborne county, having in his hands an execution against W. Murphey, took the negro by the other arm; a scuffle ensued and Bullard succeeded in taking the negro; he advertised him for sale, as the property of W. Murphey, under the execution; Goin claimed the property, and on the day of sale Goin forbid the sale, claiming the property. The sheriff, however, being indemnified, sold the boy for the sum of three hundred and forty-five dollars.

On the 6th day of October, 1836, Goin instituted an action of covenant in the circuit court of Claiborne county against Murphey on the agreement.

At the December term, 1836, he filed his declaration, setting forth the covenant and assigning as breaches thereof: 1. That he had not clothed the said boy. 2. That he did not deliver said boy to him at the expiration of twelve months from the date of the contract, as he had covenanted to do.

The defendant demurred to this declaration, and assigned as causes of demurrer: 1. There is no sufficient breach assigned. 2. There is no demand of the slave and refusal to deliver.

The plaintiff joined in demurrer, and this demurrer was overruled and defendant permitted to plead.

KNOXVILLE,
July, 1839.

Murphey
v
Goin.

Defendant then pleaded: 1. Covenants performed. Upon this plea issue was taken. 2. That the slave, at the time of the hiring, was the property of William Murphey, and not the property of Goin; that whilst in the possession of defendant he was levied upon as the property of William Murphey and taken out of the hands of defendant, and so held for a long time, and withheld by force of law from the defendant; and so defendant says by the fraud of said plaintiff and by the levy aforesaid he was prevented from keeping and performing his covenants, &c.

The plaintiff demurred to this plea. It does not appear that this demurrer was ever disposed of.

The issue of fact was submitted to a jury at the September term, 1837, upon the facts in evidence as above set forth, with proof of value. R. W. Anderson, presiding judge, charged the jury, amongst other things not excepted to, that this was an action of covenant founded upon an article of agreement signed by both the parties on the 7th day of February, 1834; that the article must be construed in its legal sense; that the court could not alter it nor make men's bargains different from what they were; that the article of agreement must be complied with by a delivery effectual and in good faith, and that if the delivery took place after the slave was levied on it was no delivery in law, and he should be delivered free from all incumbrances. The court further charged the jury that they were the judges of the fact of delivery.

The jury rendered a verdict for the plaintiff for the sum of four hundred and forty-four dollars and thirty-seven and a half cents. A motion was made for a new trial, and being overruled the defendant appealed in error to the supreme court.

Peck, for plaintiff in error.

Gray Garrett, for defendant in error.

KNOXVILLE,
July, 1839.

TURLEY, J. delivered the opinion of the court.

Murphey
v
Goin.

This is an action of covenant brought to recover damages for the non-delivery of a slave, hired by the plaintiff in error from the defendant, upon the following covenant:

"Articles of agreement made and entered into between Levi Goin, of the county of Claiborne and State of Tennessee, of the one part, and Pleasant Murphey of the latter part: Witnesseth, that the said Levi Goin doth hire a negro boy, Philip, about eight years old, for twelve months; and the said Murphey is to give the said Goin fifteen dollars for said hire, and to find the said boy in clothes, and to deliver the said boy to the said Goin at the end of the twelve months."

Upon the trial it appeared that at the end of the twelve months the negro was delivered to the defendant in error; but that he had been previously levied upon by an officer of justice by virtue of an execution against one William Murphey, and that he was taken from the defendant by the officer and sold to satisfy the debt specified in said execution. Upon these facts the circuit judge charged the jury "that if the negro was delivered after he had been levied on it was no delivery in law; that he must have been delivered free from all embarrassment." This charge is erroneous. In the case of *Graham vs. Swearingin*, 9 Yer. 276, this court, in giving a construction to a similar covenant, say, "the whole question of course turns upon the construction of the covenant, and is, whether the promise to return or re-deliver the negro, because expressed in writing and under seal, shall be construed as a special contract and undertaking, constituting in its legal effects the defendant an insurer, and binding him at all events to return and re-deliver the negro. We answer this question in the negative, both upon authority and principle." In that case the negro was not delivered because he had absconded, without the neglect or default of the hirer, and could not be re-captured, and it was held that the hirer was not responsible upon his covenant to re-deliver. We think that case directly in point and conclusive upon the present. What neglect or default has the plaintiff in error been guilty of? None whatever. He has complied with his

contract in its very terms; he re-delivered the negro at the time specified, and if there were any incumbrance upon him it was not of his creation. Could he by any means have prevented an illegal levy by a sheriff or a constable? It was not for his debt or by his procurement, and there is no principle of law by which he can be held responsible for it.

KNOXVILLE,
July, 1839.
Wallace
v
Hannum,

The redress for the defendant in error is either against the officer who sold the negro or against the purchaser. The judgment will therefore be reversed and the case remanded for a new trial.

WALLACE vs. HANNUM.

A naked possession for seven years without color or pretence of right gives, under the 2d section of the act of 1819, a right of possession only, and not title in fee.

At the October term of the circuit court of the United States held at Knoxville in 1834 the president, directors and company of the Bank of the United States recovered a judgment against James Berry, Jacob F. Foute, Thomas Henderson and Daniel D. Foute for the sum of five thousand three hundred and seventy-two dollars and forty-seven cents and costs of suit. A *fi. fa.* issued against the defendants to the marshal of the district of East Tennessee, and was by him levied upon three lots in the town of Maryville, in the county of Blount, known and distinguished in the plan of said town as lots No. 55, 56 and 57. These lots were levied on "as the property formerly occupied by James Berry," and sold by Lyon, the marshal, on the 2d February, 1835, to William Wallace for eleven hundred and eleven dollars, he being the highest and best bidder therefor. Lyon executed and delivered a deed for the lots on the 2d February, 1835, which was acknowledged on the 3d and duly registered on the 6th.

On the 17th day of July, 1835, Wallace instituted an action of ejectment in the circuit court of Blount county against Henry Hannum, tenant in possession. An issue having been

KNOXVILLE,
July, 1839.

Wallace
v
Hannum.

made upon the plea of not guilty, after repeated continuances the cause was submitted to a jury of Blount county, judge Scott presiding, at the June term, 1838.

The plaintiff produced and read to the jury a grant for lots No. 56 and 57, from the State of Tennessee, issued on the 11th day of May, 1810, to John Lowry, and also a grant from the State to John Waugh for lot No. 55, issued on the 4th day of May, 1810.

The plaintiff then offered in evidence a deed from John Lowry to James Berry for lot No. 55, dated 29th March, 1817. The plaintiff also offered in evidence a deed from Josiah Mankin, by his attorney in fact, to James Berry, for lots No. 56 and 57. The reading of these deeds was objected to by defendant's counsel and the objection sustained, in consequence of the defective probate of the deeds.

The plaintiff then read the transcript of the judgment rendered in the circuit court of the United States under which the lots in question were sold, and the marshal's deed.

The plaintiff then introduced a witness, who testified that in 1823 James Berry took possession of the lots and commenced improving them, enclosed them, built houses upon them, and in 1824 moved into them and held possession of them for himself until 1833; that he then sold them to James White, removed, and delivered the keys to James Wilson, who kept possession for White till 1834, when Hannum took possession under White; and that Hannum held possession at the time of the institution of this action, holding as tenant of White.

The defendant then read an article of agreement between James Berry, of Blount county, Tennessee, and James White, of Washington county, Virginia. This deed recites that Berry bargained, sold and conveyed to said White, by virtue of said article, lots No. 55, 56 and 57, in the town of Maryville, Blount county, for the sum of three thousand dollars, and that James Berry should make title to the premises in fee simple within two years from that date clear of all incumbrances by that time, and to give White possession within ten days from the date of the deed. This article of agreement was signed by Berry and White, and sealed with

their seals, and dated 6th April, 1833. It was proven by one of the subscribing witnesses on the 31st January, 1838, and by the other on the 19th day of March, 1838, and was registered on the 12th May ensuing.

KNOXVILLE,
July, 1839.

Wallace
v
Hannum.

Scott, the presiding judge, charged the jury that if Berry had been in possession of the lots in dispute, holding them adversely and for himself for the space of seven years, he had acquired thereby a title in fee simple to them which would be liable to seizure and sale by *fiery facias*, although he had before such seizure and sale conveyed the lots to White and surrendered the possession to him, White's deed from Berry not having been registered in due time, and being therefore void as to creditors and subsequent purchasers.

The jury rendered a verdict in favor of the plaintiff. The defendant moved the court for a new trial; the motion was overruled and an appeal in error prayed and granted to the supreme court.

Jarnagin, for plaintiff in error. Is the title of the plaintiff under his purchase at execution sale good? Plaintiff must recover upon the strength of his own title.

1. That nothing can be sold at execution sale but a legal title is generally true. What makes a legal or complete title? First, naked possession; secondly, right of possession; thirdly, right of property. An union of these three constitutes a complete title or title in fee. 2 Blac. Com. 198, 199. Lord Mansfield, in *Taylor vs. Hord*, speaking of the action of ejectment and of matters of defence for a defendant, said twenty years adverse possession was a positive title, not a complete title, because it did not give the right of property; and ejectment was a possessory action in which plaintiff must show his right of possession.

2. Had Berry the legal title at the time of levy of the execution? There were, by the laws of England, various modes of conveyance, or ways by which lands could be transferred from one to another, but all these were superseded in North Carolina by the act of 1715, lest titles should become so perplexed that "no man would know of whom to take or buy land." No conveyance for land is

KNOXVILLE,
July, 1839.

Wallace
v
Haunum.

good unless proved and registered. 1 Scott's Rev. 26, act 1715, ch. 38, sec. 5. This act, among other things, was "to direct the method to be observed in conveying lands," &c. Lands were to be thus transferred alone, but it was competent for the legislature subsequently to prescribe other modes. How far has it been done? The statute of limitations is one. The act of 1715, ch. 27, sec. 2, (1 Scott's Rev. 14,) ratified and confirmed and declared good and legal certain transfers under which seven years possession had been held. The third section is nearly as broad as the second section of the act of 1819, yet no one at any time supposed under this act a naked possession could by time become a legal title; on that subject there was no diversity of opinion. I am willing to admit that, under the provisions of the statute 21, sec. 1, ch. 16, and also the statute of limitations of South Carolina, Georgia, and perhaps some other States, and the third section of the act of 1715 of North Carolina, a possession of seven years without color of title gave a right of possession; but in North Carolina a uniform mode of conveyance by deed in writing was established in exclusion of all others by the act of 1715, ch. 38, sec. 5. *Weatherhead and Douglass vs. the lessee of Bledsoe's heirs*, 2 Ten. Rep. 360. The act of 1797, ch. 43, sec. 4, removed the presumption of right from the possessor, if it ever existed, and threw upon him the *onus probandi*, requiring the production of a paper title, &c. In Stanley's case, in 1804, in North Carolina, it was settled there must be a paper title under the act of 1715. This opinion was sanctioned in the supreme court of the United States in 1816, in *Patterson's lessee vs. Eastin: Dale and Hays vs. Good's lessee*. Defendant must have a registered deed to protect himself. 2 Ten. Rep. 394.

3. What is color of title? 4 Hay. Rep. 182. Color of title is where a possessor has a conveyance of some sort which he may believe to be a title. 5 Hay. Rep. 286, *Darby's lessee vs. M'Carroll*: Peck's Rep. 215, *Barton's lessee vs. Shall*.

Hynds, for defendant in error. 1. The agreement between James Berry and James White, by which Berry agrees to convey to White in two years thereafter, cannot affect

the case. Should it be regarded as a conveyance of title from Berry to White then it can have no effect. Although it is dated prior to the time of the levy and sale by the marshal, yet as it was not proved and registered until long after Wallace procured his title, it is void as against creditors and subsequent purchasers by the express provisions of the act of 1831.

KNOXVILLE,
July, 1839.

Wallace
v
Hannum.

2. It is insisted that James Berry had no interest in the lots sold at execution sale that was subject to be levied upon and sold by *feri facias*, because that there were no deeds of conveyance from the original grantees to himself vesting the title in him; and although he had been in actual possession of them for more than seven years, claiming to hold for himself, that the second section of the act of 1819 gave him no title, but only protected him in the possession; that the statute of limitations only operated upon the remedy, and did not vest title in the possessor. For the defendant in error it is insisted that the construction to be given to the statute of limitations, when applied to protect a person in the enjoyment of property either real or personal, is not similar to that which is applied to executory contracts. In the latter case the statute, it is said, only operates upon the remedy and does not divest the party of his right to the thing contracted for, although his remedy is lost, but in the other case it is insisted the rule does not apply. The statute of limitations, when applied to property, operates not only to extinguish the remedy of the person who may have the right to sue, but it operates in confirmation of the title of the possessor; it extinguishes the remedy and operates to confer an indefeasible title upon the possessor. Under the statute of 21 James I, ch. 16, it has been uniformly held by the courts of England that twenty years adverse possession is a positive title to the defendant; it is not only a bar to the action or remedy of the plaintiff but it takes away his right of possession, and enables the possessor to maintain ejectment even against the person having the legal title, and drives him to seek his remedy by writ of right. Salk. 421, *Stokes vs. Barry*: 1 Ld. Raymond, 741: 1 Burrow, 119: 3 Thomas Coke, 169: 8 Carth. 353: 7 East, 299: Adams on Ejectment, 76: Run-

KNOXVILLE,
July, 1839.

Wallace
v
Hannum.

nington, Eject. 14: Angel on Lim. 67-8. The same construction has been given to the statute of limitations by the courts of this country. *Dyche vs. Gass*, 3 Yer. Rep.: *Anderson vs. Gilbert*, 1 Bay's Rep. 375: *M'Read vs. Smith*, 2 Bay's Rep. 339: *Strange vs. Durham*, 2 Bay's Rep. 429: 9 Vin. Ab. 341: 3 Chitty's Blac. 155. It has been held by the courts of this State that the adverse possession of a slave long enough to create a bar confers absolute title upon the possessor. *Kegler vs. Miles*, Martin and Yerger's Rep. 426: 4 Yerger, 174, *Porter vs. Badget*: 4 Yerger, 507, *Henderson vs. Hays*: see also 2 Bay's Rep. 428: 2 Bay's Rep. 156. It is believed the same rule should be applied to the possession of real property.

GREEN, J. delivered the opinion of the court.

In this case the question is presented whether, under and by virtue of the provisions of the second section of the act of limitations of 1819, a complete title is acquired by the possessor who has been in possession without interruption for seven years.

This court decided, in the case of *Dyche vs. Gass*, 3 Yerger, 397, and in several subsequent cases, that a naked trespasser, who may have taken and held possession of the land of another for seven years without any color or pretence of right, is protected in that possession by the second section of the act of 1819. It is now insisted, and the circuit court so decided, that such possessor is not only protected in the possession, but that he has acquired a complete legal title to the land.

We cannot safely rely for the exposition of this statute upon the decisions in England upon statutes in which language similar to that employed in this second section is used. Although by the statute 21 Jas. I, ch. 16, a possession of land for twenty years took away the right of entry of the true owner, it did not destroy his title nor vest in the possessor a fee simple. He might still assert his claim by bringing a writ of right. It is true that one who had been in possession for twenty years might have been permitted to assert his right of possession, even against the true owner, in an action of

ejectment, because such possession is like a descent which tolls entry and gives a right of possession, which is sufficient to maintain ejectment. Salk. 421: 1 Ld. Ray. 741: Angel on Lim. 40. But it does not follow that such a consequence could result in this State from a seven years naked possession, because the analogy is not complete. The writ of right is not in use in this country; so that if the true owner were turned out by an action of ejectment it must be because his title is extinguished by force of the seven years possession, and by the operation of the second section of the act of 1819 is transferred to and vested absolutely in the possessor. This would be giving to this second section of our act a potency far beyond that which has ever been ascribed to the statute of James I. But if this were not so we could not safely ascribe to our legislature the meaning, although their language is similar, which the English courts understood to be that of the British parliament. Our legislature had before them the history of the statute of limitations in North Carolina and in this State. They knew what construction had been put by the courts upon the acts of 1715 and 1797, and the struggles which had been made at the bar and on the bench to establish other views than those that had prevailed. With all these facts before them the first section of the act of 1819 was framed, and then the section under consideration was enacted.

With all these facts before us, surely nothing could be more delusive than to adopt the construction which was put on the statute of James as our guide, nor more absurd than to abandon the clearer lights which are afforded by the history of our own legislature. Although the act of 1715 did not by its language require a possessor to hold by any paper title in order to his protection, yet as the legislature (act of 1715, ch. 38) had declared that no conveyance for land should be good in law unless proved and registered, and that all deeds so done should be valid to pass estates in land without livery of seizin, attornment, or other ceremony in the law, the courts refused to extend the benefits of the statute of limitations to any person except such as held possession under some paper title, constituting what was called "color of title."

KNOXVILLE,
July, 1839.

Wallace
v
Hamm.

KNOXVILLE,
July, 1839.

Wallace
v
Hannum.

Much debate and difficulty arose in the courts as to what would be sufficient to constitute color of title. To remove all doubt upon this subject the legislature passed the act of 1797, in which they declared that a party who should hold possession of land for seven years by virtue of a grant or deed of conveyance founded on a grant, should be entitled to hold the same against all persons whatsoever. A dispute arose in the construction of this act as to the meaning of the words "deed of conveyance founded upon a grant." This produced the act of 1819, ch. 28. The first section of this act declares that a party who may have had seven years possession of land which has been granted, "claiming the same by virtue of a deed, devise, grant or other assurance purporting to convey an estate in fee simple, shall be entitled to hold the same against all other persons," and should "have a good and indefeisible title in fee simple in such lands." This section is drawn with much precision and care. In order that a party shall be protected who has held possession of land for seven years, he must claim the same by some assurance which purports to convey an estate in fee simple. In such case it not only protects his possession, but in express words it confers on him the title. "He shall have a good and indefeisible title in fee simple." Now can it be believed that the eminent lawyer who drew this act would have been so precise in his language as to the character of the estate under which a party must hold, or that he would have used express words to confer the title on the possessor, if he had intended that the same consequence should result from the provisions of the second section? or can we, without charging the legislature with folly, suppose that they intended these two sections should mean the same thing? In construing an act of the legislature we must arrive, if we can, at the meaning of those who made it. The particular meaning of the words as used in a given case is very often to be ascertained by reference to the connection in which they are used; and taking the second section of this act in connection with the first, there can be no doubt but that the framers of it intended to give to a possession, by virtue of an assurance purporting to convey an estate in fee simple, a benefit which

was not conferred upon a naked trespasser. But the natural import of the language of the second section simply bars the remedy, but does not take away the right. It enacts that "no person or persons, or their heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within seven years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued." But there are no words that take away the right or confer the title on the possessor; nor does such consequence result necessarily from the prohibition to sue. If such effect be given to the second section it must be by construction, and not because it is the natural import of the language. But we cannot so construe it, because we are expressly told in the preceding section that this effect is to be given to a particular class of cases there enumerated. Certainly, therefore, when in relation to other cases language wholly different is used, we are not to understand it as meaning the same thing.

To effect the intention of the legislature courts sometimes construe the language of a statute to mean a very different thing from that which it naturally imports; but here the legislature evidently intended that which the words naturally mean: for if the argument for the defendant in error be correct there is certainly nothing in the first section which is not embraced in the second. But to assume this is to charge the legislature with folly; with the double folly of embracing in the second section all the provisions of the first, and still retaining in the act that useless section; and this too, by the use of far less appropriate language than that they had previously employed.

The second section of this act, in other respects, is very broad in its provisions; and if the construction contended for was put upon it it would be most mischievous in its consequences. We think, therefore, that to extend its provisions beyond their plain import would be alike destructive of the interests of the country and subversive of the intention of the framers.

The charge of the court, therefore, that "if Berry was in possession seven years of the lots in dispute, holding adverse-

KNOXVILLE,
July, 1839.

Wallace
v
Hannum.

KNOXVILLE,
July, 1839.

Gass
v
Malony.

ly and for himself, he gained a fee simple," is erroneous. A party who has thus held possession has acquired a right of possession, but not the title. We do not say an execution may not be levied on land thus held. But in this case Berry had abandoned the possession, and the land was occupied by another before this judgment was obtained. Berry had only a right of possession, which he had transferred to White before the judgment in the record was obtained, so as to create a lien upon his right, if indeed a lien would exist in such case. It is therefore not like the case of *Rochell vs. Benson*, Meigs, 3. In that case the land was transferred and the possession was changed after the lien of the judgment had attached.

Let the judgment be reversed and the cause remanded for another trial.

GASS vs. MALONY.

Gass sold land with covenants of warranty to Malony; Malony was sued in ejectment and Gass defended. The plaintiff recovered and Malony was evicted. Gass then took a quit claim deed for the premises from Malony, and paid Malony eight hundred dollars in discharge of his warranty. This deed was made whilst the land was adversely held by the plaintiff in the ejectment suit, and after he had held it for more than a year: Held, that the deed from Malony to Gass was champertous and void by act of 1821, ch. 66, sec. 1, and no evidence as to the fairness and good faith of the parties to such deed would rebut the presumption of champerty.

This presumption stands until the deed is proved *bona fide* not merely between the parties, but with reference to the policy and provisions of the champerty act.

On the 18th day of February, 1832, John Gass instituted an action of ejectment in the circuit court of Greene county against Robert Malony for the recovery of the possession of one hundred and fifty-nine acres of land lying on the waters of Lick creek, in Greene county. After various continuances it was submitted to a jury at the February term, 1839, judge Powell presiding.

The mass of testimony introduced, oral and documentary,

need not here be set forth, as much of it was in relation to points upon which the cause did not turn. The facts, however, upon which the case did turn, are substantially as follows:

KNOXVILLE,
July, 1839.

Gass
v
Malony.

John Gass, in 1812, sold and conveyed by deed, with general warranty, one hundred and fifty-nine acres of land, lying in the county of Greene, on the waters of Lick creek, to Hugh Malony, who sold to his brothers, Hugh and John Malony, and gave them a bond to convey.

In June, 1826, Robert Malony instituted an action of ejectment in the circuit court of Greene county against William and John Malony. Gass having sold the land by deed with general warranty, was permitted to come in and defend. In 1829 Robert Malony recovered a judgment against Gass for the premises, in the supreme court of the State at Knoxville, and William and John Malony were turned out of possession in July, 1830. Robert Malony took possession and continued to hold the land as his own under the judgment till this suit was instituted. Hugh Malony delivered up the notes of his brothers, William and John, and the title bond was cancelled and the contract between them rescinded.

In order to avoid a suit on the warranty, as plaintiff, Gass, alleged, in 1832, Hugh Malony re-conveyed the land to Gass, and Gass paid him in consideration therefor the sum of eight hundred dollars. At the time of this sale and re-conveyance Robert Malony was in possession of the premises, holding it adversely, as he had done from the date of the eviction of John and Robert Malony. Gass then instituted this action in 1832 against Robert Malony, and in support of his title to the possession of the premises (amongst other deeds) read the deed from Hugh Malony to himself made as aforesaid; and the cause turned upon the validity thereof, it being attacked as champertous under the act of 1821, ch. 66, sec. 1.

Judge Powell charged the jury as follows: "From 1805 to 1821 a person out of possession could sell and pass a title to land in as full and ample a manner as if he was in possession, although the land was claimed and possessed adversely.

KNOXVILLE,
July, 1839.

Gass
v
Malony.

In 1821 the legislature passed what is called the champerty act. By the first part of the first section of this act it will be perceived all deeds of conveyance of land, where the land is held adversely, and in which the seller had not been in possession or received the rents for one year, are declared utterly void; but there is a proviso which creates all the difficulty in construing the act. From the words of the last part of the proviso it would seem at first blush that the legislature intended to qualify the general expressions in the first clause, and instead of making such conveyances absolutely void, intended only to make an adverse possession presumption of champerty, leaving it to the party to remove that presumption, if he could, by proof. Notwithstanding this repugnancy, I am not perfectly satisfied this was not the intention of the legislature, though it may have been, as contended, to exempt the person from criminal punishment who acted from ignorance and in good faith; but be that as it may, I consider the question settled by the cases in 7th and 9th Yerger's Reports. It is true in neither of those cases do the court expressly and in terms notice the clause referred to, although in one of the cases it was made a point in the argument, but in both cases the facts presented a case of a *bona fide* sale, and they determined, as I understand the cases, unqualifiedly, that where a sale of land is made when another is in possession claiming adversely, and the seller out of possession for one year, &c. the sale is absolutely void, and the deed imparts no title to the buyer. By their decisions I am bound; therefore, if Robert Malony was in possession of the land, claiming it adversely for more than one year, the deed of 1832 from H. Malony to John Gass was void and passed no title; and if the plaintiff had no legal title he cannot recover. His deed of 1812 to H. Malony passed out of him whatever title he had."

The jury rendered a verdict for the defendant, Malony, and Gass (his motion for a new trial being overruled) appealed in error.

Peck, for Gass. 1. The charge excludes the operation of the proviso. The act is thereby made criminal when

there is the want of intention to do a wrong. This is contrary to every principle; for it is the intent that constitutes the act a crime. Here this criminal intent is excluded.

KNOXVILLE,
July, 1839.

Gass
v
Malony.

No indictment will lie under this clause of the champerty act, (see its language;) but if an indictment would lie, upon the trial of it the question of intention would be a question for the jury. If in that case it were proper for the jury, why not in this? The rule ought to be the same in both cases. Gass could maintain H. Malony in the suit against him; he could take the whole suit upon himself and not be guilty of maintainance; and why not in good faith take back the title, replacing himself in his former estate?

To come at the true construction we must consider the object of passing the law, what was the evil, and how far the remedy was intended to apply. The evil consisted in disturbing the possession by a suit under a deed got up for the purpose of a suit; but this was not intended to apply to a case where the right to the estate was honestly made the question; and in this the statute under consideration differs from the English. In that there is no such saving. Having been inserted, it is as much the law of the land as the enacting part. The saving, when made to apply, is as broad as the penalty. To illustrate this: if an indictment could be framed upon this section of the act, the saving in the proviso should be negatived in the indictment before the defendant could be made to answer for the criminal charge, and if properly charged then the defendant might show his innocence by proofs that the act was done without a bad intent. And surely when the proviso is inserted for the benefit of him taking the deed, there is no reason for the court striking it out by construction: that is to make the law, not to construe it. The proviso in this act is as much a saving as the proviso in the statute of limitations. Under the proviso in the statute of limitations there is no bar in the case of an idiot. In such a case, the fact being proved and found by the jury, there is no limitation. The statute is neutralized. So under the champerty act. Bring the case within the proviso and there can be no champerty.

This court, speaking of this act, said it was highly penal

KNOXVILLE,
July, 1839.

Gass
v
Malony.

in its provisions, and therefore cannot have the construction given to remedial acts. This remark must be applicable to every part of the act; for it is as lawful to convey a right as for an attorney to contract for his fee. 9 Yerger, 118. It is just as serious to pronounce upon a right to the freehold and destroy it, as to pronounce upon the right of a lawyer in contracting for his compensation. In the ordinary transactions of life men are presumed to be honest. If a presumption is raised in any case against one, arising out of his acts, the law permits him to rebut it; and the remark applies especially in this case, where the proviso in the act comes in his favor. This court has decided that a deed made to carry out a contract entered into previous to the adverse possession is not champertous but lawful. 10 Yerger. The act done, the making of the deed is *prima facie* champerty; but by proof it is explained and made lawful and innocent. If in that case it can be done, why not in the case before the court? Gass was bound by his deed to H. Malony; Malony was evicted; Gass was subject to an action and damages; H. Malony would not risk an action to recover back the land; the legal title is in Gass; but he cannot set it up while the deed he has made to H. Malony is in the way; H. Malony is willing to replace Gass as he stood before. There can be no breach of morals in this any more than in the case of a deed of trust or bond for a title, and a conveyance under either, while the land is adversely held. It is no gambling transaction in my view of it; no chances or speculating upon probable success. Touching the title, Gass and Hugh Malony stood together and were supported by the same claim; and it cannot be material whether Gass sue in his own name, having taken back the title, or lay a count on a demise in the name of Hugh Malony with one in his own name. If Gass is not permitted to take back the title and replace himself, then he is in a most helpless condition. The other will not sue for the land; Gass cannot, for his deed stands in the way, and the warranty in that deed makes Gass liable.

2. This is no pretended right. The evidences in the record show that the better title was in Gass, if this was a

good deed to pass the title, and therefore not champerty. **KNOXVILLE,**
15 Viner, 155-6. July, 1839.

Gann
 v
 Maloney.

RENSE, J. delivered the opinion of the court.

The question mainly discussed in this case, and upon the ground of which the plaintiff in error seeks a reversal of the judgment below, is whether the concluding words of the first section of the act of 1821, ch. 66, commonly called the "champerty act," shall be so construed as to make the meaning of the entire section to be, that an adverse possession at the time of making the deed, covenant or agreement shall create a presumption of champerty as to such deed, covenant or agreement which shall stand only until the parties to such deed, covenant or agreement shall show that as between themselves the conveyance or contract to convey was fair and *bona fide*. Such construction would be in direct conflict with the policy of the statute and with the express words of the enacting clause, which provides that when the vendor or those under whom he claims shall not have been in actual possession at the time of such sale, &c. and for one whole year before, such sale, bargain, grant, &c. "shall be utterly void." But it occurred to the framers of the law that at that time there was much granted land in Tennessee of which no person was in "actual possession" or receiving rents or profits, and in such case the first proviso enacts that one claiming title may bargain, sell or mortgage, there being no adverse possession at the time, and that in all cases sales at execution may proceed as formerly. Again; it occurred to the framers of the law that much of the uncultivated land in Tennessee was held by non-resident claimants, the sale of which to actual settlers it was the policy of the State to encourage and not to obstruct, and they provide that the act shall not be so construed as to prevent a sale by such person, if the land be not adversely held and possessed at the time. But apprehending that cases might arise, by virtue of these provisions, tending to weaken the force and obstruct the policy of the statute, and that in many cases the actual settler who was sued in ejectment might, from the difficulty of showing dates as to the commencement of the

KNOXVILLE,
July, 1839.

Gass
v
Malony.

possession or of the true time of making the deed or covenant, be unable to show champerty, although it in fact existed, they make a general provision that if one not having possession of land shall sell, &c. champerty shall be presumed until such purchaser shall show such sale was *bona fide* made; that is, *bona fide* not merely as between themselves, but with reference to the policy and provisions of the champerty act. This he may show by proving that at the date of the deed perhaps there was no actual adverse possession at all, or although apparently and in fact adverse, the person in possession was estopped in law to deny the title and possession of the vendor because derived from him. By showing this the purchaser would show the sale to be *bona fide* with reference to the general provisions of the champerty act. But to hold that these few last words of the section have the meaning contended for would make all the provisions, not only of the enacting clause but of the provisos, useless and absurd. We affirm the judgment.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF TENNESSEE.

JACKSON: APRIL TERM, 1840.

M'INTOSH and WIFE vs. LADD, et als.

Conveyances of real estate by deeds of gift to children are not fraudulent against a wife's right of dower because not founded upon a valuable consideration. To render them fraudulent and void as against her right of dower there must be an actual specific intent to defraud her in the making of such conveyances.

JACKSON,
April, 1840.

M'Intosh
v
Ladd.

This bill was filed by John M'Intosh and his wife, Elizabeth, against the devisees of Peter Burton, deceased, and his administrator, for dower, and damages for the detention thereof, and for a distributive share of his personal estate. In 1829 Burton and complainant, Elizabeth, were married in Williamson county, Burton having seven children by a former wife, some estate, and being advanced in life, and the complainant, Elizabeth, having also several children. They entered into a marriage contract, securing to each other the use, enjoyment and power of disposing of their separate estates. One of the daughters of Burton was married in 1812, the second in 1816, the third in 1819, and the fourth in 1824. He had made to each of his daughters at the time of their respective marriages advancements of portions of real and personal property, and also to his other children at different times. Shortly after the marriage the marriage contract was destroyed with the mutual consent of parties. Burton and wife did not remain long in the county of Williamson. Burton sold the tract of six hundred and forty acres upon

JACKSON,
April, 1840.

M'Intosh
v
Ladd,

which he resided in Williamson for about the sum of four thousand dollars and divided the larger portion of the proceeds amongst his children, and made deeds of gift of other portions of real estate to them, and removed to the county of Haywood. He there purchased two hundred acres of land and settled upon it. He took with him eleven slaves and some other personal property. In 1834 he died, having made his last will, in which he gave one-third of the two hundred acres of land on which he resided to his wife, a life estate in two slaves, and an absolute title to some articles of household and kitchen furniture, and divided the balance amongst his children. He had no children by his last wife. She dissented from this will. There did not appear to be any intent to defraud the complainant, Elizabeth, of her dower rights in giving the largest portion of his property through a series of years to his children, but seemed to intend to make reasonable provision for his children. It did not appear that she objected to the sale of his real estate in Williamson at the time of the sale and the distribution of the proceeds of the property amongst his children.

She afterwards intermarried with John M'Intosh and filed this bill in the chancery court at Brownsville against the administrator and devisees of Peter Burton, praying a decree for dower of the estate conveyed by deeds of gift to his children after their marriage and for damages for the detention thereof, and for a distributive share of the personal estate. The defendants answered, denying all intent on the part of deceased to defraud the complainant, Elizabeth, and also filed a cross bill alleging that the decedent left a large amount of money which came to her hands, and which had been illegally seized and appropriated by the complainant, Elizabeth. She answered the cross bill and denied the facts therein contained.

The bill came on to be heard, when the chancellor, being of the opinion that in the disposition of the real estate of the deceased by deed of gift to his children after his marriage with complainant, Elizabeth, and before his death, there was no actual and specific intent to defraud the said Elizabeth of her dower, but that said disposition was only a reasonable

and competent provision for his children proportioned to his estate, refused to decree dower out of the land so conveyed by deed of gift, but directed an account to be taken of what lands Peter Burton died seized, and also an account of the personal estate, &c. Complainants appealed.

JACKSON,
April, 1840.

M'Intosh
v
Ladd.

M. Brown, for complainant. 1. The voluntary conveyances made by Peter Burton to his children are void as against the wife's right of dower, or in other words, the conveyances being voluntary and without consideration are made subject to the wife's right of dower. By the common law the right of the widow to dower extended to all the lands of which the husband was seized during coverture, and no act of the husband could deprive her of this right. 2 Bl. Com. 129, 130, 132: 1 Thomas' Coke, 476-7: 1 Thomas' Coke, 567: *Combs vs. Young*, 4 Yer. Rep. 218, 224-5-6: Park on Dower, 5. By the statute of 1715, ch. 38, sec. 13, the common law right is fully recognized and preserved. Thus the common law remained untouched until the statute of 1794, ch. 29, sec. 8. Its policy, however, can only be considered so far as it bears on the construction that shall be given it. The question then arises what was the object of this statute? Was it designed to break down the ancient and cherished common law right of dower? Was it designed to expose the rights of the wife to the whim, caprice or ill-nature of the husband? Was it designed to authorize the husband to give away his lands, and at discretion to cut off his wife's right of dower? It is believed the statute was designed for no such purpose. It was for the convenience of the husband when *bona fide* alienation became necessary. It authorizes him to contract debts and thereby change his lands, or to sell them for a valuable consideration; but even this must be done *bona fide*; if fraudulent and designed to defeat the wife's dower it is void by the express language of the statute. If, then, a voluntary gift is made by the husband, does not the right of the wife still hold to the land? By the common law her right attaches at the marriage and always relates to it. The statute of 1784 still regards her claim as a right, and declares all conveyances void which

JACKSON,
April, 1840.

M'Intosh
v
Ladd.

are made with intent to defraud that right, and only authorizes the husband to convey on *bona fide* sales. If the claim of the wife is a right, as it clearly is, it follows that a voluntary conveyance without consideration is a fraud on that right. The donee has no equity to stand upon. The consideration of love and affection does not place his claim on as high ground as that of the widow. Her claim is older and superior. The common law so regarded it, and the statute has not changed it. *Martin and Yerger's Rep.* 329.

2. As the husband cannot make a direct conveyance in fraud of his wife's right of dower, it follows that he cannot indirectly effect the same object by selling the land for a valuable consideration and giving the proceeds to his children or others.

Mr. M'Clanahan, for defendants, cited *Littleton vs. Littleton*, 1 Bat. and Dev. 330.

REESE, J. delivered the opinion of the court.

The complainant, Elizabeth, was the widow and relict of Peter Burton, and she, having dissented from his last will and testament, filed this bill against his devisees for an assignment of dower, and an account of the annual value or profits thereof from the death of the said Peter, and for a distributive share of his personal estate. It appears from the bill and cross bill, the answers to both, and from the proofs, that in the month of June, 1830, Peter Burton, then of an advanced age, a widower, and the father of several adult children, intermarried with the complainant, Elizabeth, then a widow of an age also somewhat advanced, and the mother of several adult children by a former marriage. At various periods prior to the intermarriage of Peter Burton and the complainant, Elizabeth, the former, commencing as early as 1812, had made reasonable advancements in real and personal estate to his children upon their marriage; and in 1829, in the lifetime of his former wife, he had settled some of his younger children, about that time married, upon small tracts of land given to them by parol, but not conveyed till a few months after his last marriage. He then resided in the coun-

JACKSON,
April, 1840.M'Intosh
v
Ladd.

ty of Williamson upon a tract of land containing six hundred and forty acres, which, a few years after his marriage, he sold for upwards of four thousand dollars, and with a portion of the proceeds made further advancements to his children, and with the balance purchased a tract of land in the county of Gibson of two hundred acres, to which, with his wife he removed, taking with him some eleven slaves and also other personal property with about fifteen hundred dollars. It seems to have been his purpose to have enlarged his farm by the purchase of adjoining lands, but shortly after his removal, to wit, in the summer of 1834, he died, having made his last will and testament, and therein devised and bequeathed to complainant, Elizabeth, dower in the tract of land and two negro men slaves and other personal property, for life. Previously to his intermarriage with complainant he and complainant made and signed a contract in writing, the substance of which was that he, by virtue of the marriage, should have no claim whatever upon the estate of the said Elizabeth, nor she upon his estate. This contract was some months after the marriage dissolved by mutual consent.

The principal contest in this case is, whether the complainant, Elizabeth, shall have dower assigned her in the real estate conveyed by Peter Burton to his children by way of advancement subsequently to his intermarriage with complainant. It is insisted that she is entitled to dower in such real estate by operation of the act of 1784, ch. 29, which declares "that any conveyance made fraudulently to children or otherwise with the intention to defeat the widow of the dower thereby attached shall be held and decreed to be void, and such widow shall be entitled to dower in such lands so fraudulently conveyed as if no conveyance had been made." Without going into a recital of the proof intended to establish a fraudulent purpose in fact on the part of the husband in making the conveyance referred to, or attempting any argument on the effect of such proof, we deem it sufficient to announce as the result of our investigation the conviction that a fraudulent purpose in the conveyance is not established by the testimony against the husband. Nor is an actual fraudulent intention much insisted on in argument by the counsel

JACKSON,
April, 1840.

M'Intosh
v
Lesh.

of complainants. But it is said that a proper construction of the proviso referred to will make void as to the widow's dower a conveyance from father to child subsequent to the marriage, however *bona fide*, if such conveyance be voluntary and founded upon considerations meritorious only.

We waive at present all inquiry into the effect of the marriage contract, which, as it was destroyed by mutual consent some months after the marriage, was probably destroyed after the conveyances, or at least it is not shown by the complainants to have been destroyed before the conveyances. Such inquiry might preclude the raising of the question above referred to, and which has been chiefly discussed in this case. Authorities upon the very point are wanting; and as advancements in real estate by the father to the children must have been frequently and constantly occurring without the wife joining in the conveyance, which with us she never does except when owner of lands in her own right, the absence of authority upon the point, under such circumstances, would seem to establish that the opinion not of society only but of the profession in general from the time of the statute to this moment has been against the construction contended for. This, however, it must be conceded, is a persuasive only and not a conclusive argument in favor of the contrary construction. The learned and able judge, indeed, who delivered the opinion of the court in the case of *Hughes vs. Shaw, Martin and Yerger*, 329, makes an animated argument in favor of the construction of the statute contended for by the complainants, at the close of which, however, he adds, "We forbear to give any decision upon this question in this case; it has not been argued, nor is it essential to decide upon it." The error of that argument, it seems to us, consists chiefly in construing the general provisions of the statute on the subject of dower as if it had been "that the widow shall be endowed of all lands of which the husband was seized during the coverture, provided however that the husband may during coverture alien any of his lands *bona fide*, and for a valuable consideration, in which case the lands so aliened shall be exempted from the widow's dower." If such had been the provision, the widow's right would in all cases have

JACKSON,
April, 1840.

M'Intosh
v
Ladd.

existed *prima facie*, and those claiming against her right must have shown the sale to have been fair and for a valuable consideration. But in the actual provision made by the statute the reverse is the case. Her claim *prima facie* is limited to the land of which her husband died seized and possessed; and if it be extended beyond that, it is upon the ground stated in the proviso, and the case must be made out by her in proof. Besides, the words "fraudulently and with intention to deprive her of dower" seem not at all to apply to a *bona fide* advancement of real estate to a child, properly made according to the wants of the child and the condition of the father's property and family. Of this opinion is the supreme court of North Carolina in the case of *Littleton vs. Littleton*, 1 Dev. and Bat. 330, in which it is said that the act of 1784, as to dower, and that of 1715, as to creditors and purchasers, differ materially in their terms and in their subject matter, and that conveyances may stand against a widow which could not against creditors and purchasers. "Upon the statute of 1784 the conclusion is more obvious that only fraudulent conveyances are avoided, and not voluntary conveyances, as such. The statute, unlike that of 1715, is altogether silent upon the subject of consideration. The intent spoken of is the actual intent to defraud the widow. *Bona fide* conveyances, that is to say, such as are not intended to defraud the wife, do not seem to be within the meaning more than within the words of the act; such are sales to which a power is allowed the husband; such too appear to be *bona fide* gifts, whereby the husband actually and openly divests himself of his property and the enjoyment of it in his lifetime in favor of children and others; thereby making, according to his circumstances and the situation of his family, a just and reasonable present provision for persons having meritorious claims on him, and with that view, and not with the view to defeat nor for the sake of diminishing the wife's dower. If this had not been the purpose of the legislature, there certainly would, with respect to the advancements to children in particular, have been a specific provision in the statute, since, in the same act, the manner in which they shall be regulated as between the children themselves is expressly pointed out."

JACKSON,
April, 1840.

Byrd
v
Curlin.

Such are the views of the supreme court of North Carolina, a court of at least equal authority with our own upon the construction of this statute. With these views we are satisfied, and we adopt them. The decree of the chancellor must therefore be affirmed.

BYRD vs. CURLIN.

A sale of a horse made with a view to defraud creditors though void as to creditors is binding between the parties.

Where a plaintiff instituted an action to recover the value of a mare, by virtue of the laws passed for the benefit of poor persons, which had been sold under a *fi. fa.* against him: Held, by the court, that a fraudulent sale of the mare to a third person would defeat his right of recovery; held, also, that the declaration of the plaintiff that he had sold the mare to a third person would be competent evidence to go to the jury, yet if, in point of fact, no such sale had taken place, he would be entitled to recover.

Seth Curlin instituted an action of trover in the circuit court of Obion county against John W. Byrd, a constable of Obion county, to recover the value of a mare sold under *fi. fa.* against Curlin by Byrd to satisfy the debt of a creditor. He recovered a judgment, Harris, judge, presiding, against the constable for the value of the mare, from which the constable appealed in error to this court. The facts upon which the question in the case arises are sufficiently set forth in the opinion of the court.

Mr. Fitzgerald, for the plaintiff in error, cited and commented upon the following authorities: 2 Comyn's Dig. 201: 1 T. R. 4: *Lansing vs. Montgomery*, 2 Johnson, 382: *McFarland vs. Crary*, 8 Cowen, 252.

Mr. Totten, for the defendant in error, cited *Osborn vs. Moss*, 7 Johnson's Rep. 160: Packman's case, 6 Coke's Reports, 18:

GREEN, J. delivered the opinion of the court.

This is an action of trover for a mare, brought against a

constable for selling her to satisfy an execution against the plaintiff contrary to law.

It appeared in proof that the mare in question belonged to the plaintiff; that when the defendant came to levy the *fi. fa.* the plaintiff said the mare was not his property, and that one Harris, who was present, claimed the mare as his property, and said he had purchased her from the plaintiff, which the plaintiff did not contradict, but that he claimed the mare on the day of sale. It was proved that the plaintiff was a farmer and was the head of a family, owning no other mule, yoke of oxen or horse than the mare which was levied on and sold.

The court charged the jury "that to recover, the plaintiff must have title at the time the property was taken; that if the plaintiff had made an actual sale of the property to Harris he could not recover; but if it was an arrangement entered into in order to deter the officer from making the levy, and to enable the plaintiff and Harris to get off with the mare to Texas, and in point of fact the property still remained in the plaintiff, then the plaintiff had a right to recover if he had proved the necessary facts prescribed by the poor laws, and the question of fraud did not arise." We concur with the counsel for the plaintiff in error that if there were an actual sale of the mare to Harris, whether *bona fide* or to defraud creditors, it divested the plaintiff of his right and he could not recover. But we do not think the charge of the court contravenes this principle. His honor told the jury, "that if the plaintiff had made an actual sale of the property to Harris he could not recover." This embraces all that is contended for by counsel. A sale to defeat creditors, although void as to them, would be binding between the parties; it would therefore be an actual sale. But the court said if there was an arrangement entered into in order to deter the officer from making a levy, but in point of fact the right of property still remained in the plaintiff, he could recover. The remaining part of the charge is, that although Harris claimed the mare, and the plaintiff did not contradict his assertions, still, if the jury believed, from all the evidence, that in point of fact there had been no con-

JACKSON,
April, 1840.

Byrd
v
Curlin.

JACKSON,
April, 1840.

Wormley
v
Lowry.

tract of sale between them, but their assertions were made to deter the officer from making the levy, such conduct would not prevent the plaintiff from recovering. In this we think there is no error. It is true the declarations of Harris in the presence of the plaintiff, and uncontradicted by him, were competent evidence to prove a sale; but other facts in the case were calculated to show that these were feigned statements made to deceive the officer, and that in fact there had been no sale. The falsehood which these parties attempted to practice on the officer, though very reprehensible and immoral, did not take away the plaintiff's right of property nor prevent him from asserting it in this suit.

We think there is no error in the judgment, and direct it to be affirmed.

WORMLEY *vs.* LOWRY and RUSHING.

A bill single assigned before due for a pre-existing debt is not an assignment within the meaning of the words "due course of trade," and therefore subject to be defeated in the hands of the assignee, upon proof of failure of consideration.

Robert Lowry and Calvin Rushing warranted John S. Wormley on a bill single, executed by him to B. B. Everett, for the sum of thirty-six dollars, and assigned by Everett to them in the following words, to wit: "Pay the within to Lowry and Rushing, B. B. Everett." This assignment was without date. Judgment was rendered for the plaintiffs by a justice of the peace of Henderson county for the amount of the bill single. The defendant appealed to the circuit court, where, upon the trial before Read, judge, it was proved that fifteen dollars of the amount embraced in the instrument were agreed to be paid for hogs sold to the defendant, which Everett alleged he had in the woods, and that Everett in fact had no such hogs in the woods; that the statements upon which the promise of that amount of the money was obtained were false; that the bill single was assigned to the

plaintiffs before it was due in discharge of a pre-existing debt due from Everett to plaintiffs.

JACKSON,
April, 1840.

Wormley
v
Lowry.

Upon this proof the counsel of the defendant requested the court to charge the jury that if they were satisfied that fraud existed in obtaining the original note to the amount of fifteen dollars, that the plaintiffs, in order to protect themselves as endorsees, must show that a consideration passed from them to said Everett in the usual course of trade. The court refused so to charge the jury, but charged that the written endorsement on the bill single was *prima facie* evidence of consideration, and that the *onus* of proof lay on the defendant to show that no consideration did pass before he could enquire into the fraud in obtaining the note. The court further charged the jury that the receiving the note by the plaintiffs for and in discharge of a pre-existing debt due from Everett was a good consideration, and that the assignment of the note was in the due course of trade.

The jury found a verdict in favor of the plaintiffs for the full amount of the note and interest. A motion was made for a new trial, which being overruled by his honor judge Read, the presiding judge, and judgment being rendered in conformity with the verdict, the defendant appealed in error.

M. Brown, for plaintiffs in error. 1. In this case nothing passed from the endorsees to the endorser. The case of *Nichol and Hill vs. Bates* was where the endorsement of a third person was given up. In this case nothing was given up, nothing passed; it falls strictly within the New York cases and the cases in this State also. The case should therefore be reversed.

2. The court below also erred in refusing to charge that the proof of consideration lay on the endorsees.

Bullock, for defendant in error. Where a bill or note is transferred before it is due the assignee receives it on its own intrinsic credit; nor is he bound to enquire into any circumstances existing between the assignor and any of the previous parties to the instrument, as he will not be affected by them. *Chitty on Bills*, 141.

JACKSON,
April, 1840.

Wormley
v
Lowry.

No equities existing between the original parties to a note can be set up against a *bona fide* holder unless taken and received by him in due course of trade. 10 Yer. 429.

A note taken in due course of trade is where the holder has given for the note his money, goods or credit at the time of receiving it, or sustained loss or incurred some liability. 10 Yer. 429.

Where a note is taken in payment of a debt due and secured by the endorsement of a third person, which last note is given up and discharged: Held, that the note is taken in a due course of trade. 10 Yer. 429.

GREEN, J. delivered the opinion of the court.

This action is brought by the endorsees against the maker of a bill single for thirty-six dollars. The defendant proved that the note was given in part for hogs which the payee fraudulently represented he owned. He proved that it was assigned by the payee to the plaintiffs in payment of a pre-existing debt due them by Everett, the payee.

The court charged the jury that the "receiving the note by the plaintiffs for a pre-existing debt due from Everett, the original payee, was a good consideration, and in the usual course of trade." In this charge there is error. In *Kimbro vs. Lytle*, 10 Yer. 417, and *Nichol and Hill vs. Bates*, 10 Yer. 429, it is settled that "due course of trade is where the holder has given for the note his money, goods or credit at the time of receiving it, or has on account of it sustained some loss or incurred some liability."

Where a party receives a note for a pre-existing debt due from the person only who assigns the note he parts with nothing; he is in the same situation after a successful defence by the maker that he was before he took the note. It is not like the case where a note in bank is taken to renew one already existing. In that case the bank gives up the endorser on the old note, and thereby parts with the security; but here the plaintiffs parted with nothing. The note was not taken therefore in due course of trade. *Bay vs. Coddington*, 20 John. Rep. 637.

Reverse the judgment and remand the cause.

SEAT *vs.* CANNON, *Governor.*JACKSON,
April, 1840.Seat
v
Cannon.

Gilchrist, as administrator, confessed judgment in favor of Gasquet & Co: Held, in an action on the administration bond against Seat, as security, that such confession of judgment did not preclude such security from pleading and proving that the administrator had fully administered the estate.

This is an action of covenant instituted in the circuit court of Gibson county. The issue of law upon which the cause was decided in the court below is fully set forth in the opinion of the court.

Totten and Raines, for plaintiff in error.

M'Clanahan and Brown, for defendant in error.

TURLEY, J. delivered the opinion of the court.

This action is against Robert Seat upon an administration bond. The declaration avers that at the April term, 1834; of the circuit court of Gibson county, Robert Gilchrist, the administrator for whom the plaintiff in error was bound as security, confessed a judgment in favor of William A. Gasquet & Co. for one thousand five hundred and eighty-eight dollars and seventy cents, upon which execution was afterwards issued and returned *nulla bona*. To this declaration the plaintiff in error pleads, among other things, that at the time the judgment was confessed the administrator had no assets of the intestate in his hands to be administered, and that he had fully administered the estate. To these pleas there are demurrers, which were sustained by the court below and judgment given against the plaintiff in error, to reverse which he presents this writ of error.

The only question presented for the consideration of the court is, whether the confession of judgment by the administrator precludes his security, in a suit upon the administrator's bond, from showing that at the time of the confession the administrator had fully administered the estate and had no assets in his hands. It is admitted that the judgment is conclusive against the administrator, and that he is estopped thereby from afterwards setting up either of these defences;

JACKSON,
April, 1840.

Seat
v
Cannon.

but it is contended, and we think successfully, both upon principle and authority, that the security is not.

It is a well settled principle of law that no one who is not a party or in the relation of a representative of a party, is estopped from inquiring into the merits of a judgment by which his rights are sought to be affected, for the plain common sense reason that he shall not be judged without being heard. And surely no one can complain of this. Is it not enough that the plaintiff has obtained a judgment by the neglect or ignorance of the parties thereto, by which they are estopped and made liable for that which they did not owe, without seeking thus to affect innocent third persons who are no parties to the proceeding? But upon authority the question is clearly with the plaintiff in error. It arose directly in the cases of *Daws vs. Shed*, 15 Mass. Rep. 6, and *Jughart vs. The State of Maryland*, 2 Gill. and Johnson, 235, where it was decided as contended for by the plaintiff in error. The same thing in effect is also determined by the supreme court of the United States, in the case of *Drummond vs. Prestman*, 12 Wheaton, 515; that was a case of a guarantee of the good conduct and ultimate responsibility of one entrusted with the goods and effects of another. He confessed a judgment, the guarantor was sued, and it was held that the judgment was only *prima facie* evidence against him. Against this weight of authority not one case to the contrary is produced. We are therefore compelled to say that a judgment against an executor or administrator is only *prima facie* evidence against the securities in a suit upon the administrator's bond, and that they may make the defence of "no assets" or "fully administered."

We therefore reverse the judgment of the court below, and proceeding to give such judgment as ought to have been given, overrule the demurrer and discharge the defendant.

JARNIGAN *vs.* MAIRS and WINFIELD.JACKSON,
April, 1840.Jarnigan
v.
Mairs.

Jarnigan, whose lands were overflowed by a mill which belonged to Brown's heirs, sued Johnson, the administrator of Brown, for the continuance of a nuisance, and recovered damages against him: Held, that the record of recovery was not evidence in a subsequent suit against the vendee of Brown's heirs for any purpose except to establish the fact of its own existence and the legal consequences resulting therefrom.

Where the charge of the court against the defendant is erroneous, but the record does not show a state of facts upon which such error could operate, it is not a cause of reversal.

Where the court charged the jury that a record was evidence for no purpose, whereas it was evidence to establish the fact of its own existence and to show that complainant had not so acquiesced in an overflow of his premises so as to create a presumptive right to the easement in question, or to create a presumption of a grant or license to overflow: Held, that the record not showing a state of facts upon which this defence against prescription could arise, the error in the charge of the court was not therefore a just cause of reversal.

Jarnigan built a mill-dam overflowing the lands of a stranger; he then sold to Owen, and subsequently acquired title to the lands overflowed: Held, that a deed with warranty would not pass the right to overflow the lands as against a stranger, but that Jarnigan, having subsequently acquired title, the right did pass as against him. It however lays upon the defendant to show in the record that the deed was without warranty, and that it therefore did not pass as against him.

This is an action of trespass on the case from Fayette county. The plaintiff, David Jarnigan, alleges in his declaration that he was lawfully possessed of a saw and grist-mill on the north fork of Wolf river, in Fayette county, and that the defendants had erected a dam across the same stream below his mill, whereby its back-flowage greatly impeded and injured the operation of the plaintiff's mill.

The defendants pleaded not guilty, upon which plea issue was taken.

There is much testimony in the record of a most contradictory nature. The record does not purport to contain all the testimony brought forward by the parties in the court below. The plaintiff shows that his mill had been frequently much impeded in its operations by the back-flowage of the defendants' dam, and its utility and value was much impaired thereby. The defendants then show that the plaintiff and

JACKSON,
April, 1840.

Jarnigan
v
Mairs.

one Owen were joint owners of the ten acre tract of land on which the mill of defendants was situated; that plaintiff and Owen had built a mill on the said ten acre tract within a short distance of the site where the present mill stood; that Owen sold his interest in the land and mill to his partner, and that the defendants derived their title and possession from Owen by regular deeds of conveyance. It does not appear whether Jarnigan sold and conveyed to Owen by deed with warranty or not. The mill-dam originally erected by Jarnigan and Owen overflowed the lands above to a considerable extent. The lands adjoining above were vacant at the time of the erection of this dam. At a subsequent period the land adjoining above was entered, and Jarnigan became the purchaser and erected the dam and the saw and grist-mill upon it, the operation of which, the plaintiff alleges, was impeded by the dam of defendants. A fresh washed away the dam originally erected by Jarnigan and Owen, and one of the intermediate owners rebuilt the dam some forty or fifty paces below the site of the old dam.

In reference to the relative height of the old and new dams there was much contrariety of testimony; some witnesses stating that the dam erected by Jarnigan and Owen in 1825 was not so high as the dam subsequently erected, and others stating that it was about the same height.

The plaintiff introduced and read to the jury a copy of a record of recovery of damages against one Daniel Johnson, by the plaintiff, for continuing and keeping up the dam in the defendants' possession. The mill then belonged to the heirs of Robert Brown, deceased, and Johnson was in possession as the administrator of Brown. The plaintiff also proved that the height of the water in the pond and the back-flowage during Johnson's possession of it were about the same as that created by the defendants' present dam.

V. D. Barry, judge, charged the jury that the record was not evidence for any purpose unless it appeared that Johnson had some interest in the land at the time of the suit and recovery against him, and also that the defendants had a right to maintain their dam as high as the dam of the old

mill built by the plaintiff was at the time when he sold to the person under whom the defendants claim.

The jury rendered a verdict for the defendants. The plaintiff moved the court for a new trial upon the grounds that the verdict was contrary to the evidence, that the charge of the court was erroneous, and also upon affidavits exhibited showing that the defendants, during the pendency of the trial, purchased wines and other liquors for the jury, which the jury drank after they had returned their verdict.

This motion was overruled, and the plaintiff appeals in error to this court.

JACKSON,
April, 1840.

Jarnigan
v
Mairs.

F. P. Stanton, for plaintiff in error. 1. The record of recovery against Johnson ought to have been admitted as evidence to be weighed by the jury, because the defendants are privies in law and estate to that judgment. 1 Starkie's Ev. 219: Saund. Pl. and Ev. 612: 6 Cond. Rep. 623-4-5: *Strutt vs. Barrington*, 5 Esp. 58, quoted in 9 Petersdorf, 130: 13 Johns. Rep. 580: *Calhoun's lessee vs. Dunning*, 4 Dall. Rep. 120. The judgment against Johnson operated somewhat in the nature of an adjudication *in rem*. It determined the rights of the plaintiff as regarded the obstruction in the stream, establishing that the obstruction is a nuisance. In this view the record is admissible evidence between parties and privies, (1 Stark. Ev. 212, 213: Saund. Pl. and Ev. 612, 613: 2 Stark. 705-6: Angel, 173,) and perhaps even against strangers, as in the case of judgments respecting customs, tolls, public commons, rights of way, &c. as quoted in the authorities last cited. A judgment is always evidence to prove the simple fact of that judgment having been rendered, as well as all the legal consequences from it. The record ought also to have been admitted to prevent the defendants from acquiring a prescriptive right to overflow the upper mill by analogy to the seven years statute of limitations. This is insisted upon the authorities already cited, showing that a judgment is always evidence to prove the fact of such judgment having been rendered, with all its legal consequences.

2. The court erred in charging the jury that the defendants

JACKSON,
April, 1840.

Jarnigan
v
Mairs.

were entitled to keep up their old dam as high as it was when the plaintiff sold his interest to his partner, Owen. Originally both Owen and the plaintiff had trespassed on the land above by building their dam and throwing back the water; both were equally guilty; there could be no such thing as dividing the guilt or responsibility. Both were cognizant of this fact, and there could be no deception between them. Therefore, when the plaintiff sold out to Owen, the latter became alone responsible for all subsequent injury, and as the defendants claim title from Owen they must look to his title to see what they purchased. The plaintiff sold his interest soon after the mill was built, the right of overflow not having been perfected by lapse of time into a prescriptive right. A right permanently to overflow lands must be conferred by an instrument of writing. Meigs' Rep. 158. There was no instrument of writing here unless it be the deed of plaintiff to Owen conveying half of ten acres of land with the appurtenances, which, it is contended, operated by way of estoppel. First: This was only a deed for ten acres of land with the appurtenances, &c. Will the word "appurtenances" carry the right to overflow a stranger's land? Angel on Water Courses, 43-4-5. Second: The bill of exceptions does not show that there was any warranty of title by the plaintiff. When the grantor has no right at the time, a deed passes nothing subsequently acquired unless there is a clause of warranty, and then it operates by way of estoppel. 4 Kent, 261: *Jackson vs. Wright*, 14 Johnson's Rep. 193; *Dart vs. Dart*, 7 Conn. Rep. 250: *Jackson vs. Winston*, 9 Cowen, 1: *Pelletreau vs. Jackson*, 11 Wend. 117; 2 Thomas' Cocks, 365-6. Third: If this defence is available at all it should have been pleaded. Saund. Pl. and Ev. 38: 1 Stark. Ev. 295-6.

What did Jarnigan sell when he disposed of the lower mill? Surely nothing but ten acres of land. True, that land had a mill upon it when he sold it, and it is to be presumed the dam was attached to the mill and caused an overflow upon the lands above. But he sold to his partner, who knew very well that there was no license for this, and that they were liable for damages to the upper proprietors. There was no deception here. All was fair and perfectly understood be-

JACKSON,
April, 1840.Jarnigan
v
Maire.

tween the parties. Besides, the dam had been up but a short time; no prescriptive right had been acquired. Up to this time the overflow had been temporary; it was a bare trespass. Did the plaintiff undertake to sell this right of trespass, this privilege of doing injury to another? Where is the evidence that he did? It does not appear upon the face of the papers. Can it be implied in the term "appurtenances?" See 2 Black. N. 163. Perhaps if this had grown into a prescriptive right, or if there had been a grant or license, it would have been appurtenant to the land; but inasmuch as it was, at the time of sale, a mere unauthorised trespass or nuisance, it could not be an appurtenance. It would be absurd to speak of a nuisance being an appurtenance to land. The case would have been different if the plaintiff at the time of sale had owned the lands above. It would not then have been a nuisance and trespass, and of course might have been appurtenant, for he would have had the power to assume the privilege of overflowing it or to grant it to others.

H. G. Smith argued the case for defendants, but left no brief of which the reporter could avail himself.

REES, J. delivered the opinion of the court.

This is an action on the case for a nuisance in overflowing the land of plaintiff by means of the back-water of defendants' mill-dam. Some years since the plaintiff, being owner of ten acres of ground, built thereon a mill in partnership and conjunction with one Owen. Plaintiff did not then own the land above the mill; it belonged to a stranger; but the dam constructed by him and Owen overflowed the land above, and such overflow was necessary to the useful and profitable operation of said mill. After the construction of the mill and dam, and the use of it for some time, the plaintiff sold and by deed conveyed the ten acres of land, with the mill and appurtenances, to said Owen, who subsequently sold and conveyed to one Brown. Plaintiff then purchased the land above the mill, a portion of which was thus overflowed with water. Brown died; his heirs were minors; and one Johnson, who was his administrator, took possession of

JACKSON,
April, 1840.

Jarnigan
v
Maira.

the mill. During this time the plaintiff brought against said Johnson an action for a nuisance, on the ground of the overflow of his lands by means of the said mill, and recovered a verdict and judgment. Brown's heirs subsequently sold and conveyed the mill to the defendants, or some of them. On the trial of the cause before the jury the deeds of conveyance for the land and mill were produced and read, but are not copied or set out in the bill of exceptions. The record of the former suit against Johnson was produced and read. The bill of exceptions sets forth much testimony on both sides, and of a conflicting character, touching the value and extent of the supposed nuisance, the conduct of the parties, and the circumstances of the case; but it does not purport to set out all the testimony in the case, nor does it state that all is set out. With regard to the charge of the court, the bill of exceptions states that "it is admitted to have been correct and full except in the two following points: the court charged the jury that the aforesaid record of the recovery against Johnson was not evidence for any purpose unless it appeared that he had some interest in the land at the time of the suit; and the court also charged the jury that the defendants had a right to maintain their dam as high as the dam of the old mill built by the plaintiff was at the time when he sold to the person under whom the defendants claim."

A verdict was rendered for the defendants, which the court refused, on the motion of the plaintiff, to set aside. The plaintiff has prosecuted his writ of error to reverse the judgment, because a new trial was not granted for the supposed misdirection of the court, and on the ground of alleged misconduct of the jury set forth in certain affidavits annexed to the bill of exceptions.

I. Is there error in what is said by the court on the subject of the record of the suit against Johnson? It is argued that there is, because it is said that although there appears to have been no interest on the part of Johnson in the premises, nor any privity in estate, or other privity between him and the defendants, so that the record could be evidence against them to prove or establish the nuisance as a matter of fact, still that every record is competent to prove the fact of its

JACKSON,
April, 1840.

Jarnigan
v
Malra.

own existence, and to establish the legal consequence resulting from such existence; and that one legal consequence resulting from the existence of the record referred to is to prevent the defendants from insisting upon a prescriptive right to the easement in question, arising from lapse of time and the undisturbed enjoyment of the easement or upon a presumption of grant or license. To this it is replied that the record does not show that the land in question was granted; that to give operation to the statute of limitations it is necessary that the land should be granted, and that the prescriptions and presumptions in analogy to the statute of limitations must arise and be founded upon the same fact, namely, that the land is granted land. And it might further be replied that the record does not in other respects show a state of facts upon which this defence from prescription or presumptions would arise.' And the bill of exceptions states that the charge was full and satisfactory except in the particulars above recited; the latter of which it could not have been if the defendants had got any such advantage on the subject of presumption and prescription, as affected by the Johnson record, as is now intimated they might have done.

2. Is there any error in that part of the charge of the court which states the right of the defendants as against the plaintiffs to maintain their mill-dam at the same height as when he conveyed it to those under whom the defendants claim? It is said to be error because the record does not show that the deed from the plaintiff contained a covenant of general warranty. But it is answered that it does not show the contrary, and that it is the business and duty of those who allege error in the charge of the court or the proceedings below to show by the record that it existed. It is said that the water which overflowed the land of a stranger at the time of plaintiff's conveyance, though an easement and appurtenance of the land and mill, yet being a wrong to such stranger, did not pass by the deed. The right of the stranger did not pass, possibly; but as between the bargainor and bargainee it did pass. And when such bargainor buys of the stranger he is estopped by his previous deed, and cannot, as the stranger could, complain of such easement, or detach such appur-

JACKSON,
April, 1840.

Gift
v
Hall.

tenance from the possession and enjoyment of his bargainee. The matter contained in the affidavits constitutes no ground, in our opinion, for reversal. We therefore affirm the judgment.

GIFT *vs.* HALL and SIMPSON.

An action of debt will lie upon a bill single payable in Tennessee money, Alabama money, Brandon money, &c.

Where the words "Brandon money" were written on the face of a bill single payable in dollars, but below the seal, and it did not appear that the words "Brandon money" were placed on the same at the time of the execution of the instrument, it will not be regarded by the court as a part of the contract.

The defendant should have craved oyer of the instrument and of the words written upon it and then pleaded that they were a part of the contract; the question of fact could then have been submitted properly to the determination of a jury.

Richard Hall and John T. Simpson, partners, instituted an action of debt in the circuit court of Shelby county, for the use of William B. Greenlow, on the 3d day of January, 1839, against Robert Gift. At the February term succeeding they filed their declaration in the form usual upon bills single, in which they set forth that Robert Gift made his writing obligatory to the plaintiffs, binding himself to pay them the sum of seven hundred dollars.

The defendant craved oyer of the writing obligatory declared upon and set forth in the following words, to wit:

"\$700. On or before the 1st day of November we or either of us promise to pay Hall and Simpson seven hundred dollars, value received. Witness our hands and seals, August 22d, 1838.

HINSON GIFT, [L. s.]

(Brandon money.)

ROBERT GIFT, [L. s.]"

The defendant then filed a demurrer, which V. D. Barry, judge, overruled, and gave judgment for the balance of debt three hundred and fifty dollars, fourteen dollars damages, and costs. From this judgment the defendant appealed in error.

JACKSON,
April, 1840.

Gift
v
Eas.

T. J. Turley, for the plaintiff in error. 1. Are the words "Brandon money" a part of the bill single declared upon? That they are is expressly decided in the case of *Jones vs. Fales*, 4 Mass. R. 245, 253; also in the case of *Williams vs. Handly*, 3 Bibb's Rep. 10, and in the case of *Hughes vs. Saunders' Exr.* 3 Bibb's Rep. 360. In the case of *Blair vs. Billingsly*, Peck's Reports, it is evident the endorsement was made on the covenant long after it was executed; and the endorsement was not under seal, and of course formed no part of the covenant according to all the cases, even that of *Williams vs. Handly* above referred. The covenant was a bond to convey land when the money was paid; the endorsement was a receipt for the money, &c. In the case of *Saunders and Ogden vs. Bacon*, from 8 John. Reports, the only point decided was that it was a good promissory note, and that the endorsement was to show the consideration and to give notice. The cases on the subject of notes payable at a particular place are upon commercial law, and are decided with a view to the convenience and advancement of trade and commerce; but they are very unsatisfactory and conflicting, and therefore cannot be safely relied upon in giving a construction to this contract. See authorities reviewed in 3 Kent's Com. 98-9; Chitty on Bills, 160; 2 Camp. 205; 4 M. and S. 25. In our State as well as other States of the Union the courts seem to make little or no difference whether the place of payment is embodied in the note or contained in a memorandum at the bottom, for when it is embodied in the note they do not require that a presentment there should be averred or proved. 1 Yer. 502; 2 John. 81. Another reason for holding a memorandum no part of the note might be, that the holder may put it there for his own convenience and advantage; but here such could not be the case, for it is to his disadvantage; and the covenant being all the time in the payee's possession, it is impossible that the words "Brandon money" could have been put there at any other time than when the contract was made.

2. What is meant by the words "Brandon money?" Shall we consider them as mere idle words without meaning, or as explanatory of the contract? They cannot be treated as

JACKSON,
April, 1840.

Gift
v
Rail.

idle or unmeaning words. *Jones vs. Fales*, 4 Mass. R. 253. We must give effect to every part and parcel of a contract and construe it in such a way, if it can be done, as that no part of the contract be lost, *nam verba debent intelligi cum effectu, ut res magis valeat quam pereat*. Chitty Con. 20: 1 P. Williams, 457: 2 Blac. Com. 379: 2 M. and S. 369. The construction must be upon the entire instrument. Chitty Con. 20: 4 M. and S. 426: 11 East, 643. Another rule of construction is, that contracts must be interpreted according to the true intent and meaning of the parties; and that intentions and meaning are to be ascertained by construing the words in their plain ordinary and popular sense as they are used and understood in common parlance, (Chitty Con. 20: Co. Lit. 42: 2 Blac. Com. 487,) unless they have acquired in law a legal and technical meaning; in which case they are supposed to be used in that technical sense, unless there is something on the face of the instrument showing that they are used in a different sense. There is no rule whatever so strictly technical but that it may be varied and wholly altered by the parties for *contractus legem vincit*; as, for instance, the rule in Shelly's case, which is as technical and as closely adhered to as any other known to the law. Now, the word "money" has a technical and legal meaning, so have the words "Tennessee money," and parol proof could not be heard to vary that meaning. But the agreement might contain words that would of necessity vary it, as Tennessee money issued by and payable at the Bank of Tennessee. The words "Brandon money" have no legal or technical meaning whatever, and must therefore be understood as used in their popular sense, otherwise their meaning cannot be ascertained at all. The word "money" may have its technical meaning and acquire a meaning entirely different, and would, by the aid of explanatory words, be clearly understood in its acquired and not its technical sense by the courts, as if we say "river money," "paper money," "Memphis bank money," "Planters" or "Union bank money," or even "Memphis money" without the word bank. So we contend the words "Brandon money" are as well understood in the community as "paper money" or

"Memphis bank money," and means the notes of the Brandon bank. But can the courts judicially know what is the popular sense of these words? To me it seems they can and must. In *Hicklin vs. Tucker* the court took notice that Tennessee currency had acquired a popular meaning, different from its legal or constitutional one, and construe it in that popular sense. 2 Yer. 448. Courts must take notice of all public laws; as, for instance, that there is a public institution of their State called the Union Bank of Tennessee and the Farmers and Merchants Bank of Memphis. 4 Mass. 252. So they take notice of the laws of a sister State, as their registrative laws, interest laws, &c. and so must take notice that there is a Brandon Bank of Mississippi.

JACKSON,
April, 1840.

Gift
v
Hall.

3. Is demurrer the proper way to bring the question before the court? It is: First, for the variance. 4 Mass. R. 255. Secondly, because it is not payable in gold or silver. The case of *Hicklin vs. Tucker*, above referred to, was decided on demurrer. 2 Yer. 448. So was the case of *Williams vs. Handly*, 3 Bibb, 10. See *Jones vs. Fules*, 4 Mass. R. 252-3, upon this point of judicial notice, and 5 Cowan's Rep. 196. Courts take notice that "New York State bills," and bank notes current in the city of New York, in conformity with general usage and understanding, are cash. 9 John. R. 120; 19 John. 144.

J. C. *Humphreys*, for the defendant in error, insisted: 1. The words "Brandon money" are no part of the bill single. *Saunders vs. Bacon*, 8 John. Rep. 485; *Blair vs. Billingsly*, Peck's Rep. 85; Chitty on Bills, 8 Amer. 8 Lon. ed. 164; *Williams vs. Waring*, 21 Eng. Com. L. Rep. 1; and 12 Pickering's Rep. 399. Again: the case is presented upon demurrer, and does not and cannot show in whose hand-writing are the words "Brandon money," or when they were written, whether at the time or after the bill single was made.

2. "Brandon money" is lawful money of the United States. *Searcy vs. Vance*, Mar. and Yer. 225; *Hicklin vs. Tucker*, 2 Yer. 448; *M'Chord vs. Ford*, 3 Monroe, 166. The word "money" has a known legal signification, therefore evidence



JACKSON,
April, 1840.

GIR
v
Hall.

would not be admissable to show the parties used the words in a different sense according to the custom of the country. 3 Stark. Ev. 103S. Money is the medium of exchange established by law. Co. Lit. 207: Jac. L. Dict. 303. In the United States it is gold and silver. If it were true that Brandon is in the United States, the plaintiff in error having demurred, has failed to make the issue.

TURLEY, J. delivered the opinion of the court.

The plaintiffs in error executed their note to Hall and Simpson in the words and figures following:

"\$700. On or before the first of November we or either of us promise to pay Hall and Simpson seven hundred dollars, value received. Witness our hands and seals, August 20, 1838.

HINSON GIFT, [L. S.]

(Brandon money.)

ROBERT GIFT, [L. S.]"

Upon this note an action of debt was brought. To the declaration there is a demurrer, which was overruled by the court below and judgment given for the debt due, to reverse which this writ of error is prosecuted; and it is now contended that this is a note payable in Brandon money, which means a currency different from gold or silver, and therefore the action to be brought on it sounds in damages and debt will not lie.

It is to be observed that there is no case which goes the length of saying that debt will not lie upon instruments for so many dollars to be paid in money, let it be called by what name it may, as Tennessee money, Alabama money, &c. they being confined entirely to those payable in bank notes, cash notes and currency. The last of which we think doubtful. The only possible reason upon which the decision requiring covenant to be brought on bills single, payable in cash notes or bank notes, can be sustained is, that the express number of dollars called for can be handed over in cash notes or bank notes; and therefore it may fairly be inferred that it was the intention of the parties to pay the particular number of dollars of the kind called for, without regard to their actual value. This reason cannot apply to any case where the debt is not to be discharged in a substitute call-

ing for dollars, as in the case where it is to be paid in horses, cotton or any other kind of property, where it has always been held that the payee, if he got the property, is entitled to an amount equal to his demand in dollars. So it would seem to be when the demand is for so many dollars to be paid in the currency or money of a place.

JACKSON;
April, 1844.

GIO
v
Hall,

But, furthermore, the words "Brandon money" are not embraced in the body of the contract, but are appended to it. Now, whether they form a part of the contract depends upon the fact as to whether they were introduced at the time of making it or subsequently; if subsequently, the contract is not varied by them, and debt will lie. Now to settle this upon a demurrer precludes an investigation of the fact, for by it the plaintiff is placed in the following dilemma: If he does not declare upon his contract as one payable in Brandon money his declaration is demurred to for a variance; if he does declare upon it as such, it is demurred to for the form of action. So which ever way he turns he is met with Brandon money, although in point of fact he may never have contracted for it. It is impossible for the court to judge upon inspection whether these words are a part of the contract; we have before us nothing but a copy, and even if we had the original we do not perceive how our opportunity of judging upon it would be bettered.

We think the correct mode of pleading would have been to set forth the words "Brandon money" upon oyer, and have pleaded that they were a part of the contract, which could then have been denied by the plaintiff in a replication and the question submitted to the determination of a jury. We therefore affirm the judgment of the circuit court.

JACKSON,
April, 1840.

Bagley
v
The State.

BAGLEY vs. THE STATE.

It is indictable by the statutes of the State to bet upon a match at cock-fighting.

The statutes made to suppress gaming are, by the provisions of the act of 1824, ch. 5, sec. 5, to be construed remedially, and therefore certainty to a common intent is all that is required in charging the offence of gaming.

The indictment charges that the defendant "did unlawfully game, bet and hazard upon a match at cock-fighting a valuable thing, to wit," &c. Held, by the court, that this allegation charged the game with sufficient certainty, and also charged with sufficient certainty that the game was played.

At the July term of the circuit court of Hardeman county, 1839, the grand jury returned a bill of indictment into court against James Bagley, charging that said Bagley "did unlawfully game, bet and hazard upon a match at cock-fighting valuable things, to wit, many bank notes, goods, wares and merchandise, of the value of five dollars, with divers citizens of the said State."

The defendant moved to quash the indictment because it did not appear that there was a prosecutor. This motion was overruled.

The defendant then pleaded not guilty; and at the November term the case was submitted to a jury upon the proofs, who found the defendant guilty as charged in the indictment, and he was fined by the court fifty dollars. A motion was made in arrest of judgment, which was overruled by Barry, the presiding judge, and an appeal in the nature of a writ of error was taken to the supreme court.

Butly, for plaintiff in error. There is error in the judgment of the court below for two reasons: 1. Because the court should have sustained the motion to quash the indictment for want of a prosecutor. 2. Because the indictment is defective upon its face, and the judgment below should therefore have been arrested.

On the first point: if the offence charged in this bill of indictment is gaming within the meaning of our statutes then no prosecutor was necessary; but if it be not gaming then one was necessary, and the court should have quashed it. Gaming was not an indictable offence at the common law. It has

JACKSON,
April, 1840.

Ragley
v
The State.

been made such by our statutes, and to them alone can we safely look for an accurate description of the offence. 3 Bacon's Abridgment, title Gaming, A. It is true the English statutes have applied a penalty to gaming, but the want or addition of one or more words varying those statutes from ours might so materially enlarge, lessen, or vary the definition of the offence as to render their adjudications thereon inapplicable here and unsafe as precedents. The act of 1799, ch. 8, is the first that makes gaming an offence, and the second section of that act seems to be the foundation on which this indictment must stand or fall. All the subsequent acts on the subject of gaming refer to this act as creating and defining the offence, and all the sections of this act but the second seem to have no application to this indictment. The second section speaks only of matches at cards, dice, billiards, or any other game of hazard or address. The words "games of hazard or address," then, must include the present case, or it is not within the meaning of the act. Now, a game of hazard is that in which chance is the essential ingredient, and a game of address is that in which skill, a quality of the human intellect, is the predominant quality or characteristic, (see any respectable lexicon;) but the result of a cock-fight depends much more upon the relative size, age, weight, strength, condition and other qualities of the cocks than upon chance or skill; in other words, chance or skill, hazard or address, are not the prominent characteristics of a cock-fight; and therefore it is not within the letter, spirit or meaning of the acts on the subject of gaming. The indictment should have been quashed and the defendant below dismissed. Act of 1801, ch. 30, N. and C. 385.

Secondly: this indictment is defective on its face. Mr. Starkie says that "the rule has long been established that no person can be indicted but for some specific act or omission, or punished unless such act or omission be charged in apt and technical terms with precision and certainty on the face of the record." Starkie's Cr. Pl. 73. And that if the act or omission be not in itself illegal it must be shown to be so from the particular circumstances of the case, which cannot be supplied by any intendment whatsoever. Stark. Cr. Pl.

JACKSON,
April, 1846.

Bagley
v
The State.

176. To constitute the charge of gaming within the meaning of our acts three requisites must be set out and shown in the indictment, to wit: first, that the defendant did encourage or promote, or did himself play; second, at some one of the games prohibited; third, for money or other valuable thing. Act of 1799, sec. 2, N. and C. 355-6. This indictment does not show the first or second of these requisites either separately or together without an intendment. It should have shown that the defendant encouraged or promoted a match or made it up himself, and that it was actually fought so as to determine the bet by the event of such fight. Meigs' Rep. 101. Not showing these facts sufficiently without an intendment the indictment is defective and the judgment should have been arrested.

T. J. Turley, appeared for the State, the Attorney General being absent.

The indictment is almost in the words of the one in the case of *Bennet vs. The State*; the words there being "did gamble, hazard and bet," here "did game, bet and hazard;" it was held, that the word "gamble" was the most apt and substantial word to convey the idea of gaming. 2 Yerger's Reports, 472: see also Martin and Yerger, 127. That he who bets upon a game of hazard or address is within the act has never been the subject of a doubt with the bar or bench. 2 Yerg. 472: *State vs. Smith*, 2 Yerg. 273. This form is held good even in a case of betting on elections. 5 Yerger, 184, *State vs. Trotter*. Three allegations only are necessary: first, playing or betting; second, for what they played or bet; third, the game. No prosecutor is required on an indictment for gaming. Act of 1817, ch. 61, N. and C. 385. Cock-fighting is gaming within the act. Our act is almost a literal copy of 9 Ann, and foot-racing and horse-racing have been decided to be within that act, and that the statute ought to be extended to all sports. 1 Russ. on Crimes, 408: 2 Hawk. Pleas of Crown, 486, ch. 92, sec. 49, 52; 2 Wils. 36. So is cricket. 1 Wils. 220: 2 Hawk. Pl. Crown, 486. So is wagering that A would find a man in such a time who would carry on foot twenty-four stone. Cowp. 262. No action

can be maintained on a wager on a cock-fight. 1 Russ. 408, note K: 3 Camp. 140. So keeping a cock-pit is within the statute of 2 and 3 Ph. and M. 5 Com. Dig. 834. Keeping a cock-pit is not only indictable at common law, but is considered a gaming house within the statute 33 Hen. VIII, ch. 9. 2 Hawk. Pl. Crown, 478: 3 Keb. 510. Gaming is defined in *The State vs. Smith*, 2 Yerger, 281. The case of *The State vs. Smith*, Meigs, 101, settles this question.

JACKSON,
April, 1840.

Bagley
v
The State.

TURLEY, J. delivered the opinion of the court.

This is an indictment for gaming, upon which the plaintiff in error was convicted and judgment pronounced in the circuit court, and it is now brought here upon a motion in arrest of judgment, to sustain which several reasons are ingeniously pressed.

1. It is said that there is no game charged in the indictment which is, by any of our statutes against gaming, made indictable. The bill charges the offence to have been committed by betting upon a match at cock-fighting, and it is denied that cock-fighting is within any of our statutes against gaming. The act of 1799, ch. 8, makes void all contracts the consideration of which is money lost by playing at cards, dice, billiards, horse-racing, or any other species of gaming whatever, or by betting upon the parties who shall play at such cards or run such races; and also inflicts a penalty of five dollars upon any person or persons who shall encourage or promote any match or matches at cards, dice, billiards, or any other game of hazard or address for money or other valuable thing. The act of 1803, ch. 12, makes it indictable for any person to play within the meaning of the act of 1799, ch. 8. The question then is, Is cock-fighting embraced by the words "any other species whatever," which are used in the first section of the act of 1799, and the words "any other game of hazard and address" which are used in the second? and we think it is both upon principle and authority. It is said by judge Catron, in delivering the opinion of the court in the case of *The State vs. Smith and Lane*, that whenever money or other valuable thing is hazarded and may be lost or more than the value obtained, and dependant upon chance,

JACKSON,
April, 1840.

Bagley
v
The State.

it is gaming. 2 Yerg. 281. And this court, in the case of *The State vs. Smith*, Meigs' Rep. 101, say, any contest or course of action commenced and prosecuted in consequence of a bet or wager, with the view to determine the bet or wager upon the event of such contest or course of action, is gaming. These two propositions clearly embrace a bet or wager upon the result of a contest between two game cocks; and indeed it seems to us that there is scarcely any event more dependent upon both hazard and address than the result of such a contest. But we think that the question that cock-fighting is gaming has been expressly determined by the courts of Great Britain in adjudicating upon statutes of their own very similar in wording to ours. Under the statute of 33 Henry VIII, ch. 61, inflicting a penalty for keeping a house for unlawful games, a cock-pit is held to be a gaming house. 2 Hawkins' Pleas of the Crown, 478, 529. This could not be unless a cock-fight were a game, because it is not specified by name in the statute, and therefore must be embraced by the word "game." The statute 2 and 3 Ph. and M. 9, makes void every placard for keeping a bowling alley, dicing house, or other unlawful game. This has been construed to embrace cock-fights. 4 Com. Dig. 834. We therefore think that cock-fighting is gaming under our statutes.

3. It is contended that if it be gaming, yet the fact of betting upon the game is not charged with sufficient certainty, nor the fact that the game was played. The offence is charged in these words: "unlawfully did game, bet and hazard upon a match at cock-fighting a valuable thing, to wit," &c. By the act of 1824, ch. 5, sec. 5, all the statutes made to suppress gaming are to be construed as remedial, and not as penal statutes; from this it results that in framing bills of indictment under them certainty to a common intent in charging the offence is all that is required; and this we think is done in this case. The charge is for an unlawful gaming upon a match at cock-fighting. If there had been no match fought there could have been no unlawful gaming, for a bet upon an event which is not determined is not unlawful. To constitute gaming there must be a wager, and the event up-

on which it depended must have been decided. In the case of *Bennett vs. The State*, 2 Yerg. 472, the bill of indictment charged that the defendant did gamble, hazard and bet on a game of hazard and address commonly called thimble. This bill of indictment was held to be good. The indictment in this case must be held to be as good as that, for it is precisely the same in substance, and indeed almost in words. The word "game" is as strong and expressive as the word "gamble," and that constitutes the only difference in the mode of charging the betting in the two cases. And there is no allegation that the game commonly called "thimble" was played; the statement being in that case that he did gamble at the game, and in this that he did game at the match.

We therefore think that the court below committed no error in refusing to arrest the judgment, and affirm the same.

JACKSON,
April, 1846.

Smithéal
v
Gray.

SMITHEAL vs. GRAY, et als.

Ephraim Gray purchased a lot in the town of Portersville, paid the consideration money, and procured the execution of a deed therefor to his brother, H. Gray, for his own benefit. Held, by the court that H. Gray held this lot of ground as a trustee for the benefit of E. Gray, and that it was subject to be seized and sold by *fi. fa.* from a court of law against E. Gray, and that this trust could be raised by parol proof.

No person is protected as a subsequent purchaser unless, either by his plea or answer, he shows himself to be such by an explicit averment that he purchased for a valuable consideration, which he has paid without notice, and that he has taken a conveyance of the legal title.

Where the defendant purchased of the trustee, took a deed and paid the purchase money after the levy of a *fi. fa.* upon the lot and before the sale under a *conditional expositio*: Held, that they had constructive notice of complainant's claim and were not innocent purchasers.

Where the defendant fails to put in an answer to a bill alleging that he was not a purchaser for a valuable consideration without notice, but that he was cognizant of all the facts and a party to the fraudulent transaction: Held, that he thereby admits the notice.

Tobias Smithéal filed this bill in the chancery court at Brownsville on the 4th day of November, 1836, against John Polk and Murdoch Murchison, citizens of Tipton county.

JACKSON,
April, 1840.

Smithael
v
Gray.

Ephraim Gray and Harvy Gray, citizens of Arkansas, and against M. T. Martin and Robert J. Clow, citizens of the republic of Texas.

The bill alleges that Ephraim Gray purchased a lot in the town of Portersville, in Tipton county, paid the purchase money, and, with a view to defraud his creditors, procured the vendor to execute a deed in fee simple to his brother, Harvy Gray; that Harvy Gray held the lot in trust for the benefit of Ephraim; that complainant obtained a judgment before a justice of the peace of Tipton county for the sum of one hundred and forty dollars against E. Gray; that an execution was issued, levied upon this lot for want of personal property on the 12th of July, 1833, returned to the county court, and an order of condemnation entered up against the lot on the 6th of September, 1833, and that it was sold on the 1st of March, 1834, by *venditioni exponas*, and that complainant became the purchaser. The bill further alleges that on the 10th of September, 1833, H. Gray sold and conveyed the lot to Martin and Clow; that on the 5th of May, 1834, Martin and Clow sold and conveyed to James Hodges; that Hodges on the 30th of January, 1835, sold and conveyed to John Polk, and that Polk on the — day of April, 1835, sold to Murdoch Murchison and gave him a bond with covenant for conveyance. The bill further charges that neither Martin and Clow, Hodges, Polk, nor Murchison were purchasers for a valuable consideration without notice; and prays that such of the defendants as possessed the title to the lot should be divested of it and that it should be vested in the complainant, and for other relief.

By agreement of parties, answers from Clow, H. Gray and E. Gray were not required and were not filed. Hodges did not answer. Martin answered and stated that Martin and Clow purchased and paid for the lot at the time stated in the bill; that he knew nothing of the truth of the allegation that E. Gray had purchased the lot and paid for it, and took a deed of conveyance in the name of H. Gray. Polk answered and admitted that he had purchased at the time stated in the bill, and that he had heard of the proceedings of complainant against the land at the time of purchase; and

Murchison answered and stated that he had purchased and had a bond for title, and had never heard of the claim of complainant until after his purchase. Smitheal filed replications. Proof was taken, which established clearly that E. Gray made the contract for the lot, paid the purchase money and took a deed in the name of his brother, H. Gray, with a view to prevent his creditors from seizing upon it.

JACKSON,
April, 1840.
Smitheal
v
Gray.

The cause came on to be heard at the November term, 1838, upon the bill, answers, replications, exhibits and proofs. The bill was dismissed and an appeal taken to this court.

G. D. Searcy, for plaintiff in error. 1. Ephraim Gray, the defendant in this execution, having purchased and paid for the property and caused the deed to be made to Harvy, constituted Harvy a trustee, and as such he held the property for the use and benefit of Ephraim the *cestui que trust*. 3 Haywood, 70: Story's Equity 443. This trust may be proved by parol; a declaration in writing is not necessary. Vernon, 376: 2 Atkins, 150: 1 John. C. R. 582: 2 John. C. R. 405: 11 John. R. 91. Harvy, the trustee, by virtue of the deed from Hodges, was seized of the lot. 4 Cruise, 58 and 59.

2. This trust is the subject of sale under execution at law, by virtue of the statute of 29 Charles II, ch. 3, sec. 10, declared to be in force in this State. The language of the statute is broad; it directs the sale of all lands and tenements, &c. that any other person or persons be in any manner seized or possessed in trust for him against whom execution is sued out. This covers all trusts which are secured by or result from a conveyance. This is not a trust covenanted to be raised, but a trust raised by and resulting from the conveyance by Hodges to Harvy Gray, who by virtue of that conveyance was seized to the use of Ephraim, the defendant in the execution.

The case of *Russell vs. Stinson*, 3 Haywood, 5, settles the question. Stinson purchased and paid for the land, and, to defraud his creditors, procured the deed to be made to his children; the court there held that by the payment of the purchase money Stinson acquired a trust which was, by

JACKSON,
April, 1849.

Bankhead
v
Gray.

our law, the subject of sale under execution at law. Afterwards, upon a bill filed for re-hearing, (3 Hay. 56,) the court, in adjudicating upon 29 Charles II, ch. 3, sec. 10, say "that it comprehends all trusts and all executed uses, no matter whether arising by express declaration or resulting by operation of law." The case of *Shute vs. Harder*, 1 Yer. 9, does not overrule but affirms the decision in the case of *Russell vs. Stinson*. The court there decide that the statute extends to trusts which are raised by or result from a conveyance. In *Footte vs. Calvin*, 3 John. R. 216, it is held that if A buy land with the money of B, and take the conveyance to himself, he is a trustee for B, and such implied or resulting trust may be proved by parol, and the land may be sold under a *fi. fa.* against B, the *cestui que trust*.

The conveyance by Harvy Gray to Martin and Clow was after the levy of the execution and after the condemnation of the lot, but before the sale. This conveyance was subject to the lien acquired by the levy of the execution.

Martin and Clow took the conveyance with notice. First: they purchased pending the suit: Secondly, their answer admits that they heard of complainant's claim, considered it illegal, and did not hesitate to purchase. Therefore they purchased with actual and constructive notice of the trust and are bound by it, and became themselves *ipso facto* trustees. 1 Yer. 296: 3 Yer. 257. All the defendants had notice. The witnesses prove notice on Hodges. Polk's answer admits he heard of the sale under the order of the circuit court. Murchison took a conveyance from Polk after the commencement of this suit. Notice before the execution of the conveyance is sufficient. Saunders on Uses and Trusts, 217, note W, and references.

Strother, for defendants in error. It is contended for the defendants that Ephraim Gray had not such an interest in the lot in controversy as is the subject of an execution, (1 Yer. 1,) and if he had, the complainant has not acquired such a specific lien thereon as will authorize this court to divest the defendants of title and vest the same in the complainant, for the reason that he has not shown any deed

from the sheriff. The purchaser at execution sale in deraigning his title must not only show a judgment and levy but also a deed from the sheriff. He cannot rely on the sheriff's return; his title not being created by it, it is immaterial whether there be a correct or any return at all. 8 Yerger's Rep. 183: 4 Peters' Con. Rep. 521, and 1 John. Cases, 155.

JACKSON,
April, 1846.

Snithood
v
Gray.

If the complainant has not acquired a specific lien by virtue of his judgment and levy this court will not, under the prayer in complainant's bill, give any relief; for, if it cannot divest the complainant of title, it cannot decree that the lot be sold, or that the deeds to the defendants be cancelled; for where particular and general relief are prayed the latter cannot be more extensive than the former, or different from it. 9 Yer. Rep. 301: 2 Atkins, 141: Story on Eq. Plead. 42.

TURLEY, J. delivered the opinion of the court.

This is a bill filed by the complainant to have his rights to a lot of ground in Portersville, in the county of Tipton, declared, upon the following facts: Ephraim Gray purchased the lot from James Hodges and paid the consideration, and on the 17th day of January, 1832, caused a deed of conveyance therefor to be executed by him to his brother, Harvey Gray, in trust for himself. This trust is not expressed in the deed but is raised by parol proof. On the 14th day of July, 1832, complainant recovered a judgment before a justice of the peace in Tipton county against Ephraim Gray, upon which a *fiery facias* was issued, which was, for want of personal property, levied on the 12th of July, 1833, upon the lot in dispute. The execution and levy were returned to the county court of Tipton, and a regular condemnation pronounced thereon on the 6th of September, 1833, upon which a *venditioni exponas* was issued and the lot sold on the 1st of March, 1834, to complainant, he being the highest bidder. In the meantime, on the 10th of September, 1833, Harvey Gray sold and conveyed the lot to M. T. Martin and Robert J. Clow, who, on the 5th of May, 1834, re-conveyed the same to James Hodges, who, on the 30th of January, 1835, sold and conveyed to John Polk, from whom

JACKSON,
April, 1840.

Smithson
v
Gray.

Murdoch Murchison purchased on the — day of April, 1835, taking a bond with covenant for conveyance.

Upon this state of facts two questions are presented for the consideration of the court: first, had Ephraim Gray such interest in the lot as was by law subject to execution on the 1st of March, 1834, the date of the sale and purchase under the *venditioni exponas* issued against him from the county court of Tipton? and secondly, if he had, do the defendants stand in such a position as to protect themselves against the complainant's rights acquired by said sale and purchase, and as subsequent purchasers for a valuable consideration without notice? The first proposition involves the question as to whether a resulting trust can be raised by parol proof, and whether it is subject to execution from a court of law. Upon this proposition we are not left to argumentative induction; the question is settled by authority both in England and the United States so conclusively that it is no longer debatable; and however we may regret that trusts which carry an estate from the entire evidence of title have to be sustained by the courts, yet *sic ita lex scripta est*, and if it be desirable to have it changed, it must be done by the legislative department of the State. 1 John. Chan. Rep. 582: 2 John. Chan. Rep. 405: 11 John. Rep. 91: Vernon, 367: 2 Atkins, 159: 4 Cruise, 58-9. And finally and more conclusively upon us, because they are the decisions of our own courts, the cases of *Russel and Vance vs. Stinson*, 3 Hay. 5: *Shute vs. Harder*, 1 Yer. 9. Then Ephraim Gray had such interest as was subject to execution; and the complainant is entitled to his relief unless the defendants are protected from his claim as subsequent purchasers without notice.

Upon this proposition it is to be observed: first, no person is protected as a subsequent purchaser unless either by his plea or answer he shows himself to be such by an explicit averment that he purchased for a valuable consideration, which he had paid without notice, and that he has taken a conveyance of the legal title. See the case of *High and Wife vs. Battle and Bradley*, 10 Yer. 335. This is not done in this case. And secondly, there is no pretence that the defendants or any of them are such purchasers. The com-

JACKSON,
April, 1840.

Smitheal
v
Gray.

plainant's execution was levied on the lot on the 26th of July, 1833. Harvy Gray, the trustee, sold and conveyed to Martin and Clow on the 10th September, 1833, before the purchase under the *venditioni exponas*. They therefore had a constructive notice of complainant's claim. They conveyed to Hodges on the 5th of May, 1834. But the bill expressly charges that he was cognizant of all the facts and a party to the fraudulent transaction, which by his neglect to answer he has admitted. He conveyed to Polk on the 30th of January, 1835, who in his answer admits that he had heard of the proceedings under the judgment in favor of the complainant. He sold it to Murchison, but has never conveyed the title, having only executed a bond for that purpose. We are therefore of opinion that the complainant purchased the legal title to the premises in dispute, and declare his rights accordingly. But inasmuch as he had no deed from the sheriff of Tipton conveying the title, we leave him to prosecute his remedy for the possession at law when he shall have obtained the conveyance.

JACKSON,
April, 1840.

HUNT *vs.* WATKINS and WINBUSH.

Hunt
v
Watkins.

Hunt devised a tract of land, some slaves and personal property to his wife during her life, and at her death, his debts being first paid, to Winbush. The tenant for life and the remainder-man agreed that the farm should be cultivated by the slaves, which was done, and the debts paid out of the annual proceeds of the farm so cultivated: Held, that the debts were a charge upon the property devised, and in the absence of such an arrangement as was made it would have been his duty to have sold the personal property and satisfied the debts. In such event the loss of each owner would have been in proportion to his interest in the property.

Where the debts of a testator are discharged by the proceeds of the estate during the existence of the life estate by arrangement with the remainder-man, the remainder-man must reimburse the amount so paid to the representative of tenant for life.

It is the duty of tenant for life to keep down the interest of debts charged upon the estate devised, and no more.

Where a crop has been made upon the estate by tenant for life, who dies before it is gathered, his or her representative is entitled to the value of such crop, deducting therefrom the cost of gathering it, taking it to market, &c.

As to stock and personal property left by testator, if increased in value during the existence of the estate of tenant for life, his or her representative would be entitled to such increased value; if diminished in value, his or her representative would be bound to make up the diminution.

The representative of a tenant for life is entitled to interest which accrued during the tenancy on a sum of money due testator though not collected till after his death.

On the 27th day of May, 1833, Christopher Hunt, a citizen of Fayette county, made his last will and testament. The first clause in this will is in the following words:

"1. I give and bequeath unto my beloved wife, Sarah Hunt, and to her heirs forever, all real and personal estate which I received by her, and all other estate which I shall or may receive of her deceased father's estate. I also lend to my beloved wife, during her natural life, all of my own estate that I have not given to her, or such part as I may otherwise devise in this my last will, that is, all of my real and personal estate after all of my just debts are paid."

The fourth clause is in the following words:

"4. I give and bequeath unto John H. Winbush, of Halifax

county, Virginia, all my real and personal estate that I have loaned my wife, at her death, to him and his heirs forever; and lastly, as to all the rest and residue of my personal estate, of what nature soever, I give and bequeath to my beloved wife, Sarah Hunt."

JACKSON,
April, 1840.

Hunt
v
Watkins.

He appointed Richard Watkins and John H. Winbush his executors. In November, 1834, he died, and his will was proven and recorded in Fayette county, according to law. Winbush renounced and Watkins was qualified as executor.

The property of the testator consisted of a tract of land containing about five hundred acres, thirty-nine slaves, farming utensils, stock, and some other personal property. Thirteen of the thirty-nine slaves were acquired by the testator in right of his wife. The debts amounted to nine thousand and sixty-seven dollars and eighty-five cents. Mrs. Hunt and Winbush agreed to keep the slaves together and cultivate the farm and with the proceeds pay off the debts, and that she in the meantime should be comfortably and genteelly supported. Accordingly, an arrangement for delay having been made with the creditors of the estate, none of the real or personal property was sold, and the entire estate of which Hunt died possessed was kept together and the farm successfully cultivated by Watkins with the property given absolutely to Mrs. Hunt and that loaned to her combined.

Mrs. Hunt died on the 14th October, 1836, after the crop of that year was made but not gathered, having previously made her will without appointing an executor. N. Hunt was appointed administrator with the will annexed by the county court of Fayette county, and qualified as such, and took out letters of administration. Nathaniel Hunt received of Watkins, executor of Christopher Hunt, deceased, the property devised absolutely to Mrs. Hunt, and filed this bill in the chancery court at Somerville in the month of May, 1837, against Watkins, executor, and Winbush, remainderman, praying a decree against them for the amount of the debts paid by the proceeds of the entire estate of the deceased testator. The defendants answered, replications were filed, proof was taken, and at the June term, 1838, the

JACKSON,
April, 1840.

Hunt
v
Watkins.

honorable M. Brown, chancellor, presiding, the cause came on to be heard on the bill, answers, replications and proof. The chancellor being of the opinion that the debts of the estate of C. Hunt, deceased, were an incumbrance on the entire estate, and that the tenant for life, S. Hunt, and the remainder-man, J. H. Winbush, were bound to discharge them in proportion to the interest they acquired under the will, and the debts of the estate of C. Hunt having been paid out of the proceeds of the estate during the existence of S. Hunt's life estate, said Winbush was bound to reimburse to the representative of the said Sarah in proportion to the benefit received by him, ordered, adjudged and decreed that the clerk and master should report the relative proportion which Sarah Hunt's life estate at the death of C. Hunt bore in value to the estate in remainder of C. Hunt at the death of said Christopher, and other matters not necessary to be specially set forth.

At the November term, 1838, the clerk and master made his report, and taking into consideration the age and infirm health of the tenant for life, reported that the estate of the tenant for life stood to the estate in remainder in the relative proportion of one-third to one; and an additional report being required on minor points, the same was returned at the June term, 1839, at which term the honorable G. W. Gibbs presiding, confirmed the report of the clerk and master, and decreed that Winbush reimburse the representative of tenant for life two-thirds of the debts, and ordered and decreed that complainant pay one-third of the costs and that defendants pay the remaining two-thirds. Defendants appealed.

G. D. Searcy, for complainant. The first question raised by the facts is, whether the representative of tenant for life is entitled to reimbursement for money paid in discharge of incumbrances upon the estate. The following positions are abundantly established by the books:

1. A tenant for life is not bound to pay off incumbrances.
1 Ves. jr. 234: Gilb. Ev. 69: 1 Ves. sr. 93: 1 Story, 466:
1 Cruise, 109.

2. Tenant for life is only bound to keep down the interest on incumbrances. Same authorities: Brown's C. R. 658.

JACKSON,
April, 1840;

3. Tenant for life cannot be forced directly to pay off incumbrances, though directly he may by the remainder-man purchasing in the incumbrance, and in that case tenant for life must contribute in proportion to the benefit received by him. Powell on Mort. 903: Gilb. Ev. 69: 2 Ves. and B. 65: 4 Ves. 33: 1 Story's Eq. 466.

Hunt
v
Watkins.

Where tenant for life pays off incumbrances he becomes a creditor on the estate for the amount paid. 1 Brown C. C. 206: 1 Cruise, 110: 1 Story's Eq. 464.

The fact of payment by the tenant for life *prima facie* makes him a creditor for the amount paid, upon the ground that with his limited interest he could not be presumed to discharge the estate of another person. But this presumption may be rebutted by circumstances demonstrating a contrary intention. 1 Story, 464. In this case there is neither act nor declaration on the part of tenant for life which can be construed into an intention to benefit the remainder-man.

The next question involves the correctness of the interlocutory decree of the court below. The only case where a tenant for life can be compelled to contribute beyond the interest is where the remainder-man purchases in the incumbrance during the continuance of the life estate. The reason is, the estate in remainder being the greater estate is chargeable with the debt, while the less estate is chargeable with the interest only. The remainder-man; therefore, stands in the situation of debtor, and when he discharges the incumbrance the debt becomes extinguished. He cannot call on the tenant for life to pay interest, because there is no debt upon which interest can accrue. But the tenant for life having received a benefit from the payment, and it being impossible from the uncertain duration of his estate to ascertain with precision the interest conferred upon him, the only equitable rule which can be adopted is to make him contribute in proportion to the relative value which his estate bears to the estate in remainder. The same rule does not apply where tenant for life pays off the incumbrance; in such case the debt is not discharged; it still remains in his hands a charge

JACKSON,
April, 1840.

Hunt
v
Watkins.

upon the estate, and he becomes a creditor for the amount paid. In other words, he takes the estate with the qualification of having no interest to pay, and becomes a creditor for the full amount paid by him.

Meigs, for Winbush. The words "after payment of my debts," in the will, mean that the testator gives nothing till his debts are paid. 3 Ves. 739. They also mean, in the connection in which they stand in this particular will, that the testator's real estate is charged with his debts after the personalty shall have been first applied to them and exhausted; in other words, that the real estate is made a security collateral to the personalty for the payment of the debts. 2 John. Ch. Rep. 624. From this disposition of the estate it is inferred: First, that the executor could, at his discretion, either have hired the negroes loaned to Mrs. Hunt for two years and applied the proceeds to pay the debts, or, secondly, that he could have sold so much of the personal estate as would have been necessary to pay the debts; and as a consequence of this power and right of the executor, thirdly, that the tenant for life had no right for two years to the use of the personal property loaned her, and therefore can be entitled to no account thereof. 2 Dev. Eq. Rep. 425: 1 Hill's Eq. Rep. 373-4.

2. It is insisted that the case stated in the bill, namely, that the executor kept the whole estate together and used it, and excluded Mrs. Hunt against her consent from the use of it, is not supported by the proof; but that the case stated in the answers, to wit, that the property, real and personal, including that given and that loaned, was kept together and used by the executor by the express request of Mrs. Hunt, and in consideration of the prospective advantage to be derived from the enjoyment of the whole estate after the payment of the debts during the period of her life, which she had the usual right to anticipate might be long, is made out by the proof. Upon this state of the case the pleadings, exhibits and proof evince that every particle of the product of the estate charged with the debts, and employed by the executor to raise money to pay them, was applied and

JACKSON,
April, 1840.Hunt
v
Watkins.

exhausted in the payment, first, of the debts owed by the testator at his death; secondly, in the payment of debts contracted in the management and on account of the estate; thirdly, in the payment of the debts of Mrs. Hunt, created in the maintainance of her domestic establishment and for other purposes; and that after all, there were due and unpaid at the death of Mrs. Hunt more than four thousand dollars, contracted on the two last mentioned accounts. From all which the conclusion is deduced that Mrs. Hunt's administrator was not entitled to any account whatever. And it is insisted that Mrs. Hunt, in her lifetime, first, was satisfied with the executor's arrangement; second, never claimed any account of the estate; third, that her will had been kept out of the record because it contained no claim for arrears nor assumed to dispose thereof. It is further insisted that it would be inequitable to charge the tenant in remainder with an account not only for the debts of the testator but also for the debts of the estate growing out of its management by the executor, according to the wishes of the tenant for life, and thus embarrass him with an accountability which might injure him but could scarcely benefit him in any event.

REESE, J. delivered the opinion of the court.

It appears from the bill, answers, exhibits and proofs that Christopher Hunt, by his last will and testament, devised all the property which he possessed or had received in right of his wife to her absolutely, and all the balance not necessary for the payment of debts and legacies, whether real or personal, he gave to her for life, with remainder to the defendant, John H. Winbush. At the time of testator's death his debts amounted to some eight or nine thousand dollars, to have paid which promptly would have required the sale of a considerable number of slaves. This the executor proposed to have done, but the owner of the life estate urging that it was the wish of her husband, the testator, made known to her verbally, that none of his estate, real or personal, should be sold, the executor forebore to sell any of the property for the payment of debts, but arranged with the creditors for the postponement of their claims, and by the agreement and

JACKSON,
April, 1840.

Hunt
v
Watkins.

consent of the tenant for life, kept up and carried on the farm and the entire establishment for the purpose of applying the nett annual profits, after deducting expenses and the maintenance of the family, to the satisfaction and extinguishment of the debts. This mode of conducting the matter continued for some years, and until after the death of the tenant for life; and considerable sums arising from the annual profits of the establishment were appropriated to the payment of the debts of the testator. This bill is filed by the personal representative of the tenant for life against the executor and the remainder-man for an account and for contribution. The debts in question were a charge upon the property devised, and it would have been competent for the executor, and his duty, to have sold the slaves and personal property bequeathed, and to have paid the debts, unless the owner for life or of the remainder, or both, had paid the debts or made some arrangement, such as was in fact adopted. If such sale had taken place the loss of each owner would have been in proportion to his interest in the property. As no sale took place, but a portion of the debts charged upon the property was paid by the annual profits accruing during the continuance of the life estate, such payment so made was in effect and as to the equitable claim for contribution between the tenant for life and the remainder-man, as if paid in money by the former, and out of her separate means or absolute property. If the property had been sold out and out for the payment of debts, their loss, as has been said, would of course have been in proportion to their interest in the estate, and if a surplus had been created by such sale the tenant for life would have been entitled to the interest upon such surplus, and the remainder-man to the principal. Upon well settled equitable principles it was the duty of the tenant for life to have kept down the interest of the debts charged upon the property. In the account, therefore, which must be taken between the personal representative of the tenant for life and the remainder-man, it is not material to enquire into the products and expenses of the farm, into the particular times at which payments were made, or into the value of the hire of the slaves which absolutely belonged to the tenant for life.

It will be sufficient to ascertain the amount of payments made by the tenant for life of the debts of the testator over and above or exclusively of accruing interest, as the executor, in the arrangement made with the tenant for life, was in effect nothing more than her agent or bailiff in conducting the farm, selling the crops, &c.

JACKSON,
April, 1840.

Hunt
v
Watkins.

As to the crop of 1836, the representative of the tenant for life is entitled to its value as it stood at the time of the death of the tenant for life; in other words, the expenses of gathering in the corn and picking out the cotton, &c. and bringing both or all to market, must be deducted from the proceeds, crediting the representative of the tenant for life with the value of the services of the slaves, the absolute property of the tenant for life, so far as employed therein.

As to the stock of cattle, horses, mules, hogs, sheep, &c. and as to wagons, carts and implements of husbandry, and also as to provisions, &c. and indeed as to all the personal property, except the slaves, whether consumable in the use, or liable to be impaired and worn out, or of any other description, limited in remainder, an inquiry must be had as to the description, condition and value thereof at the time of the death of the testator and at the time of the death of the tenant for life; and if the same, by loss of number or deterioration in use, was of less value at the latter than at the former period, the representative of the tenant for life must be charged with the amount of the deficiency; but if by purchase or increase the value was enhanced, the excess or increase in value to be charged to the remainder-man. *Robertson vs. Colber*, 1 Hill's Rep. 375.

As to such fixtures as a cotton gin or cotton press, an inquiry must be made as to their worth or value when they came into the hands of the remainder-man, unless rebuilt in place of such fixtures existing at the time the tenancy for life commenced; in which case the difference of value will be inquired into as under the last head.

As to the articles of personal property belonging exclusively to the tenant for life, and not part of the general establishment limited in remainder, the representative of the ten-

JACKSON,
April, 1840.

Magee
v
Stark.

ant for life will be entitled thereto if existing *in specie*, or to their value if converted.

The representative of the tenant for life will be entitled to the interest which accrued during the tenancy for life on any sum of money due to the testator in his lifetime, although not collected till since the death of tenant for life.

As the decretal order of the chancellor and the report of the clerk and master in the chancery court proceed upon principles in some degree differing from the above, the former will be reversed and the latter set aside, and the clerk and master of this court will enquire and report as herein above directed.

MAGEE vs. STARK.

Where a slanderous charge can be collected from the words themselves it is unnecessary to make any averment as to the circumstances to the supposed existence of which the words refer.

Words which in their obvious sense carry to the mind of the hearer the imputation of a crime are *per se* actionable, otherwise they are not.

The want of an allegation that the testimony upon which the charge of perjury was based was material, is cured by verdict.

The words "I had a law suit" necessarily implies a judicial proceeding.

Thomas Stark instituted an action of trespass on the case against Asa Magee on the 20th day of August, 1838, in the circuit court of Weakley county. The plaintiff filed his declaration against the defendant for words spoken of the plaintiff imputing the crime of perjury, to wit: "I had a law suit with Thomas G. Denning, and Thomas Stark swore falsely against me, and I have advertised him as such." The defendant pleaded "not guilty" and "justification." Upon these pleas issues were formed, and at the October term, 1838, it was tried and a verdict rendered in favor of the plaintiff for the sum of two thousand dollars damages. A motion was made by the defendant to set aside the verdict. This motion was overruled and no exception taken to the

opinion of the court. The plaintiff then moved in arrest of judgment, which being overruled, he appealed in error to the supreme court.

JACKSON,
April, 1840.

Magee
v
Stark.

Totten, for plaintiff in error. 1. The slander is alleged to consist of the charge of perjury, a felony, by which it is implied that a lawful oath had been administered in a judicial proceeding, and that the witness had sworn wilfully and falsely in a matter material to the issue.

2. To charge a man with perjury is actionable of itself, because the charge implies the existence of every fact by which that offence is defined. *Ward vs. Clark*, 2 Johns. Rep. 12. For a general rule on this subject see *Brooker vs. Coffin*, 5 Johns. Rep. 188, 191; *Wedrig vs. Oyer*, 13 Johns. Rep. 124; Starkie on Slander, 19, note.

3. The words in the declaration do not, *per se*, constitute legal slander; they are like the following, which were held not to be actionable without the aid of extrinsic facts; that is to say, "he has sworn a lie," (*Hopkins vs. Beadle*, 1 Cains' Rep. 347,) "he swore false before 'squire Andrews, and I can prove it," (*Stafford vs. Green*, 1 J. R. 505;) "he has sworn falsely; he has taken a false oath against me in 'squire Jameson's court," (*Ward vs. Clark*, 2 J. R. 10.)

4. Those extrinsic circumstances then must contain that fulness and certainty which, in aid of the words spoken, would be equal to the direct charge of perjury, "and those circumstances must be averred in the declaration and proven on the trial." *Bullock vs. Koon*, 9 Cowen's Rep. 31: 4 Wendell's Rep. 534. It should appear in the present case that a suit was pending before the arbitrators; that the witness was duly sworn by some person competent to administer an oath; that he gave evidence material to the matter in controversy; and that the words imputing perjury were spoken in reference to all those circumstances; so that if the words be true and not slanderous it would be competent to assign perjury on such false swearing. These rules it will be seen are not complied with in the present case. The fact of jurisdiction is not sufficiently stated; nor that the witness had received a lawful oath administered by any one compe-

JACKSON,
April, 1840.

Magee
v
Stark.

tent to administer it; nor that the evidence was material to the issue.

5. These objections are applicable to all the counts; some of them are liable to other objections, as, that the words themselves are not stated, but only their "substance" or "effect," which is erroneous. 2 Chitty's Pl. 300, note y: 2 Salk. 417: 2 Johns. R. 12: 6 Taunt. 169: 3 M. and S. 116.

6. It is not aided by the verdict. The proceeding being before arbitrators it will not be presumed that they as such had power to administer an oath, nor is it pretended to be stated how or by whom the oath was administered. *Sayre vs. Jewett*, 12 Wendell's Reports, 136: *Trott vs. West*, 1 Meigs' Rep. 168: *Shelton vs. Bruce*, 9 Yerger's Rep. 26.

7. The word "justification" should not, it is believed, be regarded as a plea; but if it should it would not prejudice the motion in arrest. It would not be presumed to contain more than a mere justification of the words alleged, and would not therefore aid the declaration. *Pelton vs. Ward*, 3 Cains' Rep. 73.

8. As to the case of *Sherwood vs. Chase*, 11 Wend. Rep. 40, it does not seem to be sustained by the cases referred to by the court. That of *Niven vs. Munn*, 13 Johns. Rep. 48, expressly states a suit pending before a justice, an oath administered by the justice "having full power and authority to administer an oath." The same may be said of *Chapman vs. Smith*, 13 Johns. Rep. 78, where the declaration is still more special, fully stating a court, jurisdiction, an oath administered, &c. The case of *Pangburn vs. Ramsey*, also referred to, only decides that a verdict will aid a title defectively set out, not a defective title. 11 J. R. 142. So of the case of *M'Laughry vs. Wetmore*, 6 J. R. 82. The declaration there is so perfect that we may refer to it as a model for pleading in such cases. The case of *Sherwood vs. Chase* is in violation of principle, not sustained by the cases it refers to, and is in effect overruled by *Sayre vs. Jewett*, 12 Wend. 136: *Shelton vs. Bruce*, 9 Yerger, 26.

Fitzgerald, for defendant. 1. The first question is, whether the declaration is in proper form. That it is, cannot be

doubted. It is precisely the form in 2 Chitty on Pleading, 296. The subsequent courts refer to matter stated in the first. This is proper. 2 Chitty on Pl. 300, and note h: 2 H. Bla. 131: 2 Wils. 114: Cro. Car. 76: Cro. Eliz. 240.

JACKSON,
April, 1840.

Magee
v
Stark.

But it is argued, 2. That the declaration should have averred that the evidence given by the plaintiff below on the trial was material. This is not necessary and is never done. See the form in 2 Chitty, 296: also form in 3 Chitty, 351-2: Starkie on Slander, 208: *Miller vs. Miller*, 8 J. R. 59, 2d edition: Starkie on Slander, 49, 51: *Towle vs. Robbins*, 12 Mass. 498: *Niven vs. Munn*, 13 J. R. 48: *Peake vs. Oldham*, 1 Cowp. 275, first edition, 153: American Jurist, April, 1839, 198: *Allen vs. Perkins*, 17 Pickering, 369: Jurist, October, 1836, 213: *Power vs. Price*, 12 Wend. 500.

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From the foregoing cases it is now clearly and well settled that no such averment is necessary; it is a matter of proof not essential to be averred in the declaration; it is a fact in the case if necessary to appear, appears only in the trial and in the evidence. Then, considering the words in this declaration as only actionable by reason of the colloquium explained by the inuendos, even in that view of the case such averment is not necessary. But I contend that in this case the words are actionable *per se*, and that there was no necessity of any averment as to the trials, proceedings and conversations stated in the declaration, and that the declaration would have been good without any such averments, and that such averments are surplusage.

The words in the first count are, "I had a law suit with Thomas G. Denning about a hog, and Thomas Stark swore falsely against me and I have advertised him as such." Now, are these words actionable, and could an action be sustained on them without alleging a colloquium? Starkie on Slander, 206, lays down the general rule thus: "Where the slanderous charge or imputation can be collected from the words themselves it is unnecessary to make any averment as to circumstances to whose supposed existence the words refer." And he states a case from Cro. Car. 337, where the words were "thou hast given J. S. nine pounds for forswearing himself in chancery, and hast hired him to forge a bond." After ver-

JACKSON,
April, 1840.

Magee
v
Stark.

dict for the plaintiff it was moved in arrest that there was no allegation of a suit in chancery, or that J. S. forswore himself in his answer or as a witness, or that the plaintiff suborned J. S. to forswear himself, or to show any particulars wherein he forswore himself; but the court said these averments were immaterial, &c. "The imputation of an act may be inferred from a statement which virtually includes or assumes the commission of the principal act or a strong suspicion of it." Starkie on Slander, 43, and cases there cited. "The criminal quality of the act imputed may appear from circumstances, explaining the meaning of words otherwise doubtful or innocent." Starkie on Slander, 50, 51, &c.

What is the rule for the construction of words that now prevails universally? It is thus laid down by Starkie on Slander, 28, he says: "it is now the settled rule that both judges and juries shall understand words in that sense which the author intended to convey to the minds of the hearers as evinced by the whole circumstances of the case. That it is the province of the jury, where such doubts arise, to decide whether the words were used maliciously and with a view to defame; such being matter of fact to be collected from all concomitant circumstances. And for the court to determine whether the words taken in the malicious sense imputed to them can alone, or by the aid of the circumstances stated upon the record, form the legal basis of action." The old rule of construing in the milder sense is totally exploded, and I can find no case in the States of this Union where it has prevailed. *Hoyle vs. Young*, 1 Wash. 150: *Demarest vs. Husing*, 6 Cowen, 76, 87: *Goodrich vs. Wolcott*, 3 Cowen, 239: *Gibbs vs. Dewey*, 5 Cowen, 505: *Hume vs. Arassmith*, 1 Bibb, 165: *Logan vs. Steel*, 1 Bibb, 593: *Caldwell vs. Abby*, Hardin, 529, 530: *Beers vs. Strong*, Kirby, 12: *Rose vs. Mitchell*, 2 Dall. 58: *Brown vs. Lamberton*, 2 Binn. 37: *Walton vs. Singleton*, 7 Serg. and R. 451: *Walker vs. Winn*, 8 Mass. 248: *Chaddock vs. Briggs*, 13 Mass. Rep. 248, 254: *Sawyer vs. Eifert*, 2 Nott and M'Cord, 511: besides the several cases already cited.

3. This case has thus far been viewed as upon demurrer, but it stands upon a motion in arrest of judgment after verdict

without exception. The judgment is beyond all question sustainable. In the case of *Peak vs. Oldham*, 1 Cow. 275, cited in Starkie on Slander, 34, Lord Mansfield says, "the court will lean against setting aside a verdict in such a case, more especially in a case like the present, where the words have appeared to the jury to be so scandalous as to induce them to give a verdict for five hundred pounds damages, and where that verdict has received the sanction of the court in which the action was brought by their refusing to grant a new trial upon an application to them for that purpose." He further says, in the same case: "What! after verdict shall a court be guessing and inventing a mode in which it might be barely possible for these words to have been spoken by the defendant without meaning to charge the plaintiff with being guilty of murder? Certainly not. Where it is clear that words are defectively laid a verdict will not cure them. But where from their general import they appear to have been spoken with a view to defame a party, the court ought not to be industrious in putting a construction upon them different from what they bear in the common acceptance and meaning of them." *Rex vs. Horne*, 1 Cowper, 672; *Blizzard vs. Kelly*, 9 Eng. Com. Law Rep. 87; 22 Eng. Com. Law Rep. 412; *Ford vs. Primrose*, 16 Eng. Com. Law Rep. 234; American Jurist, April No. 1838, 191; 12 Wend. 500.

"After a verdict the presumption is that such parts of the declaration, without proof of which the plaintiff ought not to have had a verdict, were proved to the satisfaction of the jury." 6 Comyn's Digest, and cases there cited: 1 T. R. 545, 704. The following cases fully establish the doctrine here contended for. *Owens vs. Morehouse*, 1 J. R. 276; *Thomas vs. Roosa*, 7 J. R. 461; *Duffie vs. Hayes*, 15 J. R. 327; *Bartlet vs. Crozier*, 15 J. R. 250; *Livermore vs. Boswell*, 4 Mass. Rep. 437; *Hull vs. Crandall*, Kirby, 402; *Chesnut Hill Turnpike Company vs. Rutter*, Serg. and R. 6; *Thompson vs. Mupor*, 1 Dall. 458, 461; *Brown vs. Barry*, 3 Dall. 365; *Pate vs. Bacon*, 6 Munf. 219; *Hawkins vs. Walker*, 4 Bibb, 292; *Goodloe vs. Potts*, Cook's Rep. 299; Peck's Rep. 317; *Anderson vs. Read*, 2 Tenn. Rep. 205.

JACKSON,
April, 1840.

Magee
v
Stark.

JACKSON,
April, 1840.

GREEN, J. delivered the opinion of the court.

Magee
v
Stark.

This is an action for slanderous words. The declaration has several counts, in the first of which it is alleged that the defendant spoke of and concerning the plaintiff the following words: "I had a law suit with Thomas G. Denning about a hog, and Thomas Stark swore falsely against me, and I have advertised him as such." The defendant pleaded "not guilty" and "justification." The jury found a verdict for the plaintiff for two thousand dollars. The defendant moved in arrest of judgment, which motion was overruled and an appeal in error prosecuted to this court.

The question now is, whether these words are actionable in themselves. Where the slanderous charge or imputation can be collected from the words themselves it is unnecessary to make any averment as to the circumstances to whose supposed existence the words refer. Starkie on Slander, 206. And slanderous words are to be understood in their obvious sense; and if, when so understood, they necessarily convey to the mind of the hearer the imputation of a crime, they are actionable *per se*, otherwise they are not. In the case of *Sherwood vs. Chase*, 11 Wend. Rep. 38, the words were: "I cannot enjoy myself in a meeting with Sherwood, for he has sworn false and I can prove it; and if you (meaning the bystanders) do not believe it you can go to esquire Bassett's and see it in a suit between James L. Sherwood plaintiff and Richard P. Brown defendant." After verdict the court refused to arrest the judgment, holding that the defect in the declaration, which was the want of an averment that the testimony was material, was cured by the verdict. This case of *Sherwood vs. Chase* is almost identical with the one now under consideration. The defendant in this case said he had a law suit with Thomas G. Denning about a hog, and Thomas Stark swore falsely against him. Although he does not say before what court the law suit was pending, yet as a law suit could not exist except before some judicial tribunal, the statement that he had a law suit is equivalent to a statement that there was a judicial proceeding. And so the court held in the case of *Pelton vs. Ward*, Cains, 73, where the

words were: "You swore a damned lie and you know it, for which you now stand indicted." The court said the words in this instance could mean nothing less than perjury, for it was an allegation that the plaintiff had sworn to such a lie as rendered him obnoxious to an indictment.

JACKSON,
April, 1840.

Magee
v
Stark.

The mere charge that a party "swore falsely" or "swore falsely before 'squire Andrews," as in *Stafford vs. Green*, 1 Johns. Rep. 505, would not necessarily impute perjury, and therefore would not be actionable. There was nothing to show a judicial proceeding was referred to, or that 'squire Andrews was a justice of the peace. But a law suit implies in itself a judicial proceeding, and when mentioned necessarily refers to a judicial proceeding.

As to the other part of the charge, that "Thomas Stark swore falsely," it necessarily implies that an oath was administered, and that in giving his evidence he stated a falsehood. The want of an allegation that the testimony was material we have seen is a defect that is cured by the verdict. 13 Johns. 80: 6 Johns. 82.

We think there is no error in the judgment and order it to be affirmed.

JACKSON,
April, 1840.

GAINES vs. CATRON.

Gaines
v
Catron.

A certificate by a clerk of the acknowledgment of a deed by the vendor of real estate not giving any description of the land or of the amount conveyed, is not good, and such deed can not be read.

Where an act of the assembly was passed making valid certain certificates of probate, after such deed had been rejected in the circuit court for the insufficiency of the probate thereof Held, that such act was void and could not cure such defects.

Where two persons, each claiming separate authority to act as attorneys in fact for a third person, sign a joint deed, such joint deed does not make the act other than the several deeds of the persons.

Where partners in merchandise purchase lands with their partnership funds: Held, that the right of survivorship does not exist in case of death of one of the partners, it not appearing that the lands were held in joint tenancy for the purpose of carrying on any useful trade or manufacture or any purpose of commerce.

John Catron instituted an action of ejectment in the circuit court of Tipton county against Edmund P. Gaines for the recovery of the possession of a tract of land lying in said county. A judgment was rendered upon an issue upon the plea of not guilty in favor of Catron. Gaines appealed in error.

The facts of this case and the documentary evidence upon which the cause turned are so fully set forth in the opinion delivered by the court as to supersede the necessity of any additional statement in regard thereto.

G. D. Searcy, for plaintiff in error. The court erred in charging that the deed of the surviving partner passed the title to all the lands specified therein: 1. Because John G. Blount does not attempt by this deed to convey the interest of Thomas Blount's devisees; the deed is not signed by him as a surviving partner, nor is there any fact in the record from which it can be inferred that he intended by this deed to convey any thing more than his undivided interest. The fact of the existence of the partnership between himself and Thomas Blount, and the fact of the land having been purchased with partnership money does not prove his intention to convey as a surviving partner; on the contrary it is manifest,

JACKSON,
April, 1940.Gaines
v
Catron.

from the fact of his executing the deed in his individual name and the expressions in the deed, "my interest and title," together with the fact that Catron obtained a conveyance from Thomas Blount's executors, that the grantor never intended to convey, nor did the grantee expect by this deed to get a conveyance for more than John G. Blount's undivided interest in the land. If it had been the intention of the parties to pass a greater interest the conveyance would have been executed by J. G. Blount as surviving partner, and the deed made to express clearly the quantum of interest conveyed, nor would there have been any necessity in taking a conveyance from the executors of Thomas Blount.

2. This land was granted to John G. and Thomas Blount, not as partners, but to them individually. The grant is the only evidence of title, and the character in which they take is a part of their title, for upon it depends the destination of the land; as in this case, if they held in the character of partners for partnership purposes, upon the death of one of the partners his interest vested in the survivor. If they held in their individual characters the interest of the deceased partner vested in his devisees; therefore, parol proof cannot be received to show that the grantees were partners and purchased the land with partnership money: first, because it does not prove they held as partners for partnership purposes, and is therefore irrelevant; secondly, if deemed relevant it has the effect of altering the grant and changing the destination of the land. The same argument will apply to the introduction of parol evidence to prove the character in which J. G. Blount executed the deed to Catron. If he executed it individually it passes only an undivided half of the fifteen thousand acres; if, as a surviving partner, it is contended that it passed the whole fifteen thousand acres, the effect of the evidence is to double the quantity or add to the deed an undivided interest of seven thousand five hundred acres. This is altering the deed.

3. Suppose the land to have been bought with partnership money and held in the partnership name, we deny the right of the surviving partner to convey. The preamble to the 6th section of the act of 1784, ch. 22, declares survivor-

JACKSON,
April, 1840.

Gaines
v
Catron.

ship in joint tenancy in real and personal property to be manifestly unjust, and the enacting clause of that section destroys survivorship entirely. The proviso makes the following exceptions out of this general destruction of survivorship: first, lands held in joint tenancy for the purpose of carrying on trade and commerce; secondly, lands held in joint tenancy for the purpose of carrying on any other useful work or manufacture established or pursued with a view to profit to the parties concerned. These are the only exceptions; and the statute further provides that the lands so held shall vest in the surviving partner, not generally, but for a particular purpose, viz: to enable him to settle and adjust the partnership business and pay the partnership debts. It provides further, that so soon as this object is effected the surviving partner shall settle with and pay over the surplus to the heirs of the deceased partner, thus re-converting it into realty. The exceptions contained in the proviso does not extend to lands purchased with partnership money nor to lands held by partners, but to lands held by partners for partnership purposes only, that is, for carrying on commerce and manufactories. The statute makes no other exceptions, the court can make none; and it vests in the surviving partner, not generally, but to enable him to settle and adjust the business and pay the debts, and for no other purposes: consequently a sale by him for any other purpose would be void as to the heirs or devisees of the deceased partner. The legislature intended by this statute to give persons who would invest capital in manufactures and useful works of improvement assurance that the realty necessary to carrying on trade should at their death be secured to their heirs. Before the surviving partner can sell a necessity must exist, and such cannot be presumed. A naked deed unaccompanied with evidence of necessity would give no title. See *Bruce vs. Drake*, 2 Litt. 244. In this case the lands were not held in the partnership name; they were not held for the purpose of carrying on trade, manufactures, or any other useful work, nor were they sold to enable the surviving partner to adjust the partnership business or pay the partnership debts. The consideration expressed in the deed (viz. one dollar)

JACKSON,
April, 1840.Gaines
v
Catron.

negatives such an assumption. And if, by this deed, the surviving partner intended to convey the whole fifteen thousand acres, the great disproportion between the consideration expressed and the value of the land would render the conveyance as to Thomas Blount's devisees fraudulent and void. The case of *M'Alister vs. Montgomery*, 3 Hay. 94, cannot be relied upon as an authority in support of this sale. The facts of the case are not given, and the presumption is that they brought the case within the exceptions contained in the proviso of the statute. It decides nothing more than: first, in that particular case the surviving partner had the right to sell; secondly, lands held for partnership purposes, upon the death of one of the partners, does not survive but descends and vests in the heirs at law of the deceased partner as real estate in other cases. If this last position be true then the case may be relied on as an authority against this sale. For it follows that if the interest of Thomas Blount in the land upon his death did not survive, but descended to his heirs at law, or by virtue of his will passed to and vested in his devisees, who held as tenants in common with the surviving partner, there being no unity of interest between the devisees and the surviving partner, the power of sale given by the statute to the surviving partner is a naked power and must be strictly pursued; he may sell, but for no other purpose than that of enabling him to settle and adjust the partnership business and pay the partnership debts. Again; this deed was executed by F. B. Fogg and John Blount, junior, as attorneys of John G. Blount. If, upon the death of one partner, his interest vests in his heirs or devisees, and the power of sale given by the statute to the surviving partner be a naked power, it cannot be delegated. See 4 Litt. 395: 4 John. C. R. 368. Nor can a power, though coupled with an interest, be delegated if it be a personal power. In this case the surviving partner alone can judge of the necessity of sale; it is therefore a personal power.

W. T. Brown, for defendant in error. In this case the deed from John G. Blount, senior, the surviving partner of J. G. and Thomas Blount, purports to convey the fee to the

JACKSON,
April, 1840.

Gaines
v
Catron.

entire tract in dispute, and the question which goes directly to the merits is:

1. Whether J. G. Blount, as surviving partner, had a right to sell and convey the land in controversy, the same having been purchased with partnership funds. The proviso to the act of 1784, ch. 22, sec. 6, is, that "estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any useful work or manufacture established and pursued with a view of profit to the parties therein concerned, shall be vested in the surviving partner or partners in order to enable him or them to settle and adjust the partnership business and pay off the debts which may have been contracted in pursuit of the said joint business; but as soon as the same shall be effected the survivor or survivors shall account with and pay and deliver to the heirs, executors, administrators and assigns, respectively, of the deceased partners, all such part, share or sums of money as he or they may be entitled to by virtue of the original agreement, if any, or according to his or their share or part in the joint concern, in the same manner as the partnership stock is usually settled between joint merchants or the representatives of their deceased partners." To bring the case within the proviso of the statute the defendant in error must show two things: first, that the land or estate was held in joint tenancy; secondly, that it was held for the purpose of carrying on and promoting trade and commerce, or other useful work or manufacture, with a view of profit to the parties. In regard to the first proposition there can be no ground for dispute. The land was purchased with partnership funds and held by the partners in joint tenancy. In regard to the second, we think the case within the meaning and spirit of the proviso. It is admitted that no trade or work or manufacture was established or carried on upon the land, nor is it necessary that such should have been the case. To say that the trade or work must be carried on upon the land to authorize the surviving partner to sell and convey would be giving to the statute a very narrow and restricted meaning. If such be the reading of the proviso, although a partnership might own thousands of acres of land and owe thou-

JACKSON,
April, 1840.

Gaines
v
Ostrom.

sands of dollars, a surviving partner would only be empowered to sell the lot upon which the store-house was erected in which the trade was carried on, whilst all the valuable lands would descend to the heirs, and by operation of law be placed beyond the reach or control of the surviving partner. Such a construction, we contend, would defeat the very end and object of the proviso, to wit, the enabling "the surviving partner to settle and adjust the partnership business and pay off the debts which may have been contracted in pursuit of the said joint business." The proof shows that J. G. and Thomas Blount were partners in trade; that they purchased a large amount of western lands with the partnership funds with a view to profit, no doubt believing at the time that the purchase of the western lands would at some future day be a source of greater profit to them than the same amount of money vested in any other trade. Under these circumstances, to say that the proviso in question does not vest the lands in the surviving partner to adjust the partnership business and pay off the debts would be judicially to nullify the act of assembly. This view of the statute is fully sustained by a case reported in 3 Haywood, 94, where the act received a judicial interpretation; also a case in 6 Yer. 20. Should the court recognise the authority of these cases the right of John G. Blount to make the deed in question will be established.

2. The right of the acting executors to convey under the will of Thomas Blount is not necessarily presented by the record, and the counsel for defendant in error requests that no opinion be given upon that question as the same question will be presented fully and distinctly at the next term of this court in a case now pending in the circuit court of Shelby county for one thousand acres of land covered by this deed.

3. The probate of the deed made by F. B. Fogg, as attorney for Blount, is good and sufficient in law. See acts of assembly, 1840.

TURLEY, J. delivered the opinion of the court.

The premises in dispute between the parties in this case were granted by the State of North Carolina to John G.

JACKSON,
April, 1840.

Guines
v
Catron.

Blount and Thomas Blount July 2d, 1790. Thomas Blount, by his will, executed on 23d August, 1808, divided all his interest therein amongst the three sons and two youngest daughters of his brother, William Blount, to be divided among them or those surviving at the time of his death, charging them, however, (together with other lands devised by him in the same way,) with a sum equal to all his just debts, to be raised in such a manner as his executors should think best. John G. Blount, Willie Blount, Thomas H. Blount and William G. Blount were appointed executors to the will, of whom only two, viz: Thomas H. Blount and William G. Blount qualified as such; John G. Blount and Willie Blount having neglected so to do. John G. Blount and Thomas Blount were partners in trade in 1785, and so continued to be till 1812, when Thomas Blount died.

On the 20th day of February, 1813, John G. Blount, by his power of attorney, constituted Francis B. Fogg his agent and attorney in fact, with authority for him and in his name and for his use and benefit to make sale of all and every tract and parcel of land, land warrants or other interest in lands of which he was seized or possessed in the State of Tennessee, and to execute conveyances for the same. This power was confirmed by said Blount on the 23d of August, 1824. A similar power, but with the additional authority to compound, agree, settle and determine all disputes, law suits, hindrances, troubles, quarrels and molestations of and concerning his lands, was made by said John G. Blount to his son, John G. Blount, junior, on the 20th day of October, 1823.

On the 27th of August, 1823, Francis B. Fogg and John G. Blount, junior, as attorneys in fact for John G. Blount, senior, sold and conveyed the premises in dispute, together with several other tracts, amounting in all to ten thousand acres, for the nominal consideration of one dollar, to John Catron, the defendant. This deed of conveyance has the following certificates of probate endorsed on it:

"State of Tennessee, Maury county. Court of errors and appeals, sixth circuit, September term, 1823. Then the within power of attorney from John G. Blount, by his attorney, Francis B. Fogg, to John Catron, was produced in open

court at said term, the execution thereof duly acknowledged by Francis B. Fogg as aforesaid, and ordered to be certified."

JACKSON,
April, 1846.

Gaines

▼
Catron.

"State of Tennessee, Davidson circuit court, November term, 1824. This indenture of bargain and sale between John G. Blount, senior, by his attorney in fact, John G. Blount, junior, of the one part, and John Catron of the other part, was acknowledged in open court by John G. Blount, junior, attorney in fact as aforesaid, to be his act and deed, and which is ordered to be registered."

"State of Tennessee, Davidson county, circuit court. This indenture of bargain and sale between John G. Blount, senior, by his attorney in fact, John G. Blount, junior, of one part, and John Catron of the other part, was proven in open court to be the act and deed of Blount, by the oaths of Ephraim H. Foster and Thomas Martin, subscribing witnesses thereto, and ordered to be registered. July 12th, 1825."

This deed was registered in Weakley county on the 12th day of July, 1825, and in Obion county 21st July, 1825. On the 27th day of December, 1828, Thomas H. Blount and William G. Blount, the acting executors of the last will and testament of Thomas Blount, sold and conveyed all the lands contained in the deed executed by Francis B. Fogg and John G. Blount, junior, as the attorneys of John G. Blount, senior, to said John Catron, in satisfaction of the claims which one Elijah Robertson had upon the real estate of Thomas Blount and John G. Blount for his locative interest therein. The right to do this they claim under the power in the will which authorizes the executors to raise, in any manner they may think best, out of the testator's lands devised to the children of William Blount, a sum equal to all his just debts.

Edmund P. Gaines, the plaintiff in error, intermarried with Barbara, one of the two youngest daughters of William Blount, and as such, a devisee under the will. She is dead, and he is tenant by the courtesy, and in possession of the premises.

Upon the trial the defendant objected to the reading of the deed executed by Francis B. Fogg and John G. Blount,

JACKSON,
April, 1840.

Gaines
v
Catron.

junior, as attorneys in fact for John G. Blount, senior. This objection was sustained so far as to its execution by Francis B. Fogg, but overruled as to John G. Blount, junior, and the deed as executed by him was permitted to be read. In this we think the court below erred, because there is no sufficient evidence of its execution in the probate endorsed upon the deed. The names of the parties are mentioned, but there is no description whatever of the land or the amount conveyed; and this at the time of the trial was fatal. But it is contended, although the deed ought not to have been read as one executed by Francis B. Fogg and John G. Blount, junior, yet that it was properly executed by Francis B. Fogg; and although, at the time it was rejected for want of sufficient probate, the law sustained the judgment of the court, yet since an act of the legislature of the State having made the probate good, and the deed having been read, the court will now consider it as a deed executed by Francis B. Fogg. To this course there are two unanswerable objections:

1. We are compelled to decide the case upon the law as it stood at the time of the trial. If this were not so a judge would never know when he had settled the rights of parties. He decides the case as the law is and before the revising court meets the legislature changes the law and his judgment is reversed and a different one given, not because he committed an error but because the law has undergone a change. This question was before us at Nashville last term, and was decided as it now is.

2. The deed as executed by Francis B. Fogg is not before the court; no more so than if it had been upon a distinct and separate piece of paper from that executed by John G. Blount, junior. They were not joint attorneys in fact, but each in his own individual capacity was taking upon himself the representation of John G. Blount, senior; and their having signed the same deed has not made it their joint deed. But supposing the deed executed by Francis B. Fogg to have been sufficiently proven, the next question for consideration is, how much of the land in dispute does it convey? The plaintiff in error says the one half, the defendant the whole. We have seen that the land was granted to Thomas Blount

and John G. Blount, and it is contended that inasmuch as they were partners in trade at the time, the right of survivorship existed in John G. Blount upon the death of Thomas Blount. Let us examine this proposition. By the act of 1784, ch. 22, the right of survivorship among joint tenants is abolished, with the proviso however, "that estates held in joint tenancy for the purpose of carrying on and promoting trade and commerce, or any other useful work or manufacture, established and pursued with a view of profit to the parties therein concerned, shall be vested in the surviving partner or partners in order to enable him or them to settle and adjust the partnership business and pay off the debts which may have been contracted in pursuit of the said joint business." There can be no pretence for saying that the land in dispute in this case was held in joint tenancy by John G. Blount and Thomas Blount for the purpose of carrying on and promoting trade and commerce, or any other useful work or manufacture. There is nothing from which we can say it was bought by them in their partnership name; it is only by implication that the conclusion that it was paid for out of partnership effects can be arrived at. And, in the power of attorney to Francis B. Fogg and John G. Blount, junior, John G. Blount, senior, does not treat it as partnership property. He does not authorize a sale for partnership purposes; but the sales are to be of his lands and for his use. We therefore think that the deed executed by Francis B. Fogg, if it convey any thing, only conveys half the land, and that no more under any circumstances can be recovered. As to the question arising upon the deed from the acting executors of Thomas Blount, deceased, which is, whether when there are several executors, and some qualify and others neglect without a relinquishment of their right in open court, those who qualify can execute, without those who do not, a trust reposed in the executors of the will to raise money by the sale of real estate, we forbear giving an opinion, as it is not pressed by the plaintiff and has not been argued by the defendant.

The judgment of the circuit court will be reversed and the case remanded for a new trial.

JACKSON,
April, 1840.

Gaines
v
Catron.

JACKSON,
April, 1840.

Pilcher
v.
Hart.

PILCHER vs. HART.

It would seem that though a man may not wilfully destroy the property of another, although it may be a nuisance, yet he should not be held to so strict an accountability for its unintentional destruction as would be visited upon him for a like destruction of property in the lawful use and possession of its owner.

The question as to whether any permanent erection in a navigable stream is a nuisance is a question of fact for a jury to determine, and would not be a nuisance if the general and public advantages arising from said erection greatly exceeded any slight inconvenience therefrom.

The fact that the defendant procured his supplies from a wharf-boat previous to his destruction of it would raise no presumption that he had assented to its unlawful location and erection; and even his assent to the erection of a nuisance would not take away his right afterwards to abate it if he thought proper.

Where the jury were called upon to determine whether a wharf-boat permanently erected and fastened in a navigable stream was a nuisance or not, and the court below having charged the jury that the fact that the defendant, who had destroyed the wharf-boat as a nuisance, having procured his supplies therefrom previously, could not allege it to be a nuisance and destroy it as such: Held, that although the court should think that the evidence fully authorized the verdict, yet the court could not support it without becoming judges of the fact, and should therefore reverse.

Where there are several distinct facts stated in a special replication to a plea which do not constitute distinct answers to the plea, yet all tend to make out the defence set up: Held, that the alleging of such facts do not make the replication demurrable for duplicity.

If there are any facts stated in the replication which do not tend to that point, and are not distinct answers to the plea, they should be disregarded.

William W. Hart and Royal G. Hart, partners in trade, instituted an action of trespass on the case in the circuit court of Shelby county on the 28th March, 1837, against Mason Pilcher, the captain of the steam-boat Wm. L. Robeson, engaged in the navigation of the Mississippi river. The plaintiffs were the owners of a wharf-boat permanently attached to the banks of said river at the public landing at the town of Memphis. This wharf-boat was engaged in furnishing supplies of provisions, groceries and the like to steam-boats and others, was one hundred and fifty feet long and twenty-four feet wide, and its value estimated at from two to four thousand dollars, and the stores on board at the

time of its destruction, hereafter mentioned, at from one thousand to two thousand dollars. The wharf-boat seemed to be regarded by the witnesses who testified in this case as furnishing great conveniences to those engaged in the river trade and as presenting but slight obstruction to the navigation of the river. It appeared that Pilcher had been in the habit of procuring his supplies of provisions from this wharf-boat as he passed the town of Memphis.

JACKSON,
April, 1840.

Pilcher
v
Hart.

In the month of December, 1836, the steam-boat Wm. L. Robeson, in landing at the public landing place at Memphis, ran with great violence against the wharf-boat, and sunk it with its stores. There is in the record a mass of conflicting testimony with regard to the management of the boat by captain Pilcher at the time of the landing, and upon the situation and condition of the wharf-boat at the same time, which is not necessary to be set forth, and which was submitted to a jury of Shelby county and resulted in a verdict of four thousand dollars damages for the plaintiffs.

The defendant moved the court for a new trial, which was overruled, and judgment rendered for the plaintiffs on the verdict. The defendant appealed in error to this court.

The state of the pleadings and the charge of Barry, presiding judge, are so fully set forth in the opinion of the court as to supersede the necessity of any further statement of them.

Leath, for Pilcher. This is a question of right between a boat, used for purposes of navigation in the Mississippi river, and one denominated a wharf-boat, which is not used for navigation. The plaintiff in this court was, at the time of the sinking of the defendants' wharf-boat, a common carrier for the public on the waters of the Mississippi river, he being the commander of the steam-boat Wm. L. Robeson, and engaged in navigating the Mississippi river. He was then in the performance of a lawful act, it being an inherent right of all the citizens of Tennessee to use the waters of the Mississippi river for purposes of navigation. Art. 1, sec. 29, Constitution of Tennessee. This important section of the constitution secures to Pilcher the right not only to navigate the Mississippi river, but to have a free navigation of the

JACKSON,
April, 1840.

Filcher
v
Hart.

same. It is laid down in many authorities, but more particularly in *Abbott on Shipping*, that free navigation means or implies the use not only of the waters of a stream or river but also the use of the banks of the same. The plaintiff in error, then, as the commander of the *Wm. L. Robeson*, being a steam-boat used for the legitimate purposes of navigation on the Mississippi river, had a right to the free use of the waters of said river that he might navigate her free of obstructions, and also a right to the free use of both banks of the same that he might land his boat any where or at any point he desired, provided he did not interfere with the rights of those who were equally entitled to the same privilege with himself, being actually like him engaged in navigating the Mississippi river. Had the Harts, as wharf-boatmen, as just a right to use that portion of the waters of said river which their boat occupied, and as just a right to the use of that portion of the bank against which he lay, as the master of the steam-boat *Wm. L. Robeson* had? The defendants' wharf-boat was not used for purposes of navigation, the only legitimate use for boats on any navigable stream. It was permanently attached to the shore or bank by cables and timber spars, and that too in a public landing, being in the port of Memphis. It was to all intents and purposes a dwelling house or water domicil, though from the fact that it floated it was called a boat, and because it lay at a wharf it was called a wharf-boat, a mixed term not to be found in any law dictionary or vocabulary, and by which no vessel used for navigation is designated.

The one party, then, in this court, claims to have been using a constitutional right at the time the accident occurred, and the other has no such claim, but appeals to the corporate authority of Memphis for his rights and privileges. The Mississippi river being a great public highway (1 Hawk. Pl. of the Cr. 296,) which the citizens of the United States had a right freely to navigate, was not the wharf-boat or dwelling-house of the defendants a nuisance? A wagoner occupying one side of a public street in the city of Exeter before his warehouse in loading and unloading his wagon, so that both carriages and foot passengers were incommoded by his cum-

brous goods lying in the way, was held to be rightly convicted of a common nuisance, although there was room for carriages and passengers left on the other side of the street. 1 Hawk. Pl. Cr. 701-3-11: 6 E. R. 427. Was it sufficient for the plaintiff below that he left room for the steam-boat Wm. L. Robeson to pass down or up the river without running against his dwelling? I answer no. It was immaterial to the master of the Robeson whether the Mississippi river at Memphis is one or a thousand miles wide. His object was not solely to pass down or up without stopping. We know he could have done so without injury to himself or the plaintiffs' dwelling. Had he passed on without stopping or had he gone over on the other side, to the Arkansas shore, he would not have effected his object, which was to land in the port of Memphis. Had he not a right to do so? Most undoubtedly. Can any portion, however small, of the bank or shore in that port be permanently used or monopolized by any craft or boat of any description whatever to the entire and perpetual exclusion of navigating vessels? If so, the persons who navigate that great highway have not a right to the free use of all its banks and waters. Had not the plaintiff in this court a right to say to the defendant, "Sir, I want to land my boat in the port of Memphis: I have a right to land at the safest and best point of landing in said port. You are occupying that point or portion of the bank at which it is most convenient for me to land. You have no exclusive right to it. You are not using this highway for purposes of navigation as I am; and if you do not give place I shall land my boat against you, and you, being a trespasser and acting in your own wrong, must take the consequences." Will this court look at the consequences of establishing a contrary principle? The Mississippi river is already a great public highway, as much so as the streets of our cities. There are perhaps at this moment more than a thousand vessels, of different descriptions, navigating the mighty "Father of Waters." But the time will come when its free navigation, embracing the free use of its banks, as well as current, will be vastly more important than at present. The great Mississippi Valley is still in its infancy. If wharf-

JACKSON,
April, 1840.

Plicher
v
Hart.

JACKSON,
April, 1840.

Pflicher
v
Hart.

boatmen, then, are to be put upon an equality with the navigators of the Mississippi, and are not to be viewed as trespassers, acting in their own wrong, and obliged to take the consequences of their hazardous situations, will not every person, wishing to engage in the river trade and to avoid the heavy expense of purchasing lots or land and the trouble of erecting business houses thereon, as well as to get clear of taxes to the State, gradually from time to time abandon their business houses on land and slide into the Mississippi river, and thus, in the course of the next century, block up each bank of that great highway? And if one foot or one inch of the banks of the Mississippi may be thus appropriated by individuals to their own private gain, I can see no reason why the whole of its banks may not be so occupied to the entire exclusion of those who have right to the free use of the same.

Again: upon the principle that wharf-boats are not nuisances, but are upon an equal footing with steam-boats, the result will be that they will occupy all the good and best landings on the Mississippi, and steamboats, seeing that they are to be held liable for negligence, even of the slightest degree, in landing against them, will refuse to land where they are, and will be thus driven to land at inferior and unsafe landings as best they can. The court below, then, erred in not charging the jury that the plaintiffs' wharf-boat was a nuisance, inasmuch as it obstructed the free navigation of that part of the Mississippi river embraced in the port of Memphis, and that the replication of a license from the corporation of Memphis could avail the plaintiff nothing, as the corporation had no authority to establish a nuisance. The court further erred, as the plaintiff in error insists, in charging the jury that the master of the Wm. L. Robeson acquiesced, by trading with the wharf-boat, in the existence of a nuisance, if the wharf-boat was one, and that having so acquiesced he was precluded from complaining of her as a nuisance. This is not the language, but the idea of the charge of the judge below. No law can be found to sustain this position.

For the above errors the demurrer to the plaintiffs' repli-

cation should have been sustained below as well as for the following special causes: first, the replication of the plaintiff below is double and multifarious; secondly, it is uncertain, and thirdly, it is argumentative. 1 Ch. on Pl. 260, 637, 687: 10 Johns. Rep. 289, 400, *Rogers vs. Bark*: 20 Johns. Rep. 405: 1 East, 217: 10 East, 73.

JACKSON,
April, 1840.

Pileher
v
Hart.

W. T. Brown, for Hart. 1. The action of trespass on the case is the proper remedy in this case. The injury resulted from negligence. *Williams vs. Holland*, Eng. Com. Rep. vol. 25, p. 261: 3 East, 593: 5 Esp. 18: 5 T. R. 648: 1 Esp. 55: 1 Barn. and Cres. 145: 2 Dowl. and R. 256: 3 Camp. 188: 4 Barn. and Cres. 226: 6 Dowl. and R. 275: 5 Car. and P. 375, 407: 10 Bing. 112.

2. To maintain the action it is necessary to show that defendant in landing his boat did not use the care and diligence of an ordinarily prudent man, in consequence of which plaintiffs sustained the damage. 1 Esp. R. 535: 2 Stark. Ev. 208: 2 Kent, 600-1: 5 Yerg. 82: 6 Johns. Rep.

3. In this case the proof is clear that there was gross negligence. Even if it were contradictory, unless the evidence preponderated greatly against the verdict, this court, in conformity to their own decisions, will not disturb the verdict.

4. But it is insisted that the wharf-boat, lying upon the waters of the Mississippi river, and fastened securely to the river bank under the circumstances described by the witnesses, was a nuisance, and the defendant had a right to abate it.

A nuisance means annoyance, hurt, inconvenience or damage. 3 Black. 216: 4 Black. 167. A nuisance to a navigable river is any erection, to wit: a wharf, if it materially injure the passage for boats, or if the wharf impair the public easement in the stream. 3 Kent, 432: 4 Black. 167. The question whether the wharf-boat did injure the passage or impair the public easement in the river, is altogether a question of fact. 3 Kent, 430: 3 Black. 219: 13 Eng. C. L. Rep. 254: *Angel on Tide Waters*, 132, 144. All the evidence proves the wharf-boat to have been a great public convenience; therefore, this defence of nuisance must wholly fail. But it is insisted there is error in that part of the opinion where

JACKSON,
April, 1840.

Fitcher
v
Hart.

the court charged the jury that if the defendant expressly or by implication assented to the establishment of the wharf-boat at the place where it lay, he could not defend himself from the consequences of having negligently destroyed it, together with the goods and property on board, by now asserting it to be a nuisance. Whatever it might be, so far as the public were concerned, the using the boat as a place of landing and procuring supplies, &c. would raise a presumption of his assent.

In this charge there is no error. 2 Chit. Black. 5: 2 Salk. R. 458. If there was error in the charge the court would not reverse for the reason that the evidence expressly disproves a nuisance and establishes the fact that the wharf-boat was a great public convenience. The court having charged upon a state of facts which had no existence in the case, even if there was error, this court would not reverse. This point was not raised in the case or thought of by any person except the judge. There is no complaint that the damages are excessive, provided the plaintiffs have shown a cause of action.

The demurrer to the replication was properly overruled. 1 Chitty's Pl. 541, 609, 611, 612, 536, 520, 519: 3 Chitty, 554.

GREEN, J. delivered the opinion of the court.

This is an action of trespass on the case brought by the defendants against the plaintiff in error. The declaration alleges that the plaintiffs below were in possession and the owners of a certain vessel called a wharf-boat, of great value, lying in the Mississippi river at the public landing near the town of Memphis, and that the defendant, then and there being possessed of the steam-boat Wm. L. Robeson, and having said boat under his care and management, took such bad care of his said steam-boat that through his carelessness, mismanagement and misdirection of said steam-boat, she ran foul of and with great violence struck against plaintiffs' said wharf-boat, whereby she was broke and totally wrecked, and thereby goods, wares and merchandize to a great value were wholly lost, to their damage eight thousand dollars. To this declar-

ation there was a plea of "not guilty" and issue. The cause was tried and a verdict for the plaintiffs was found, which was set aside and a new trial awarded. The defendant then, by leave of the court, pleaded two additional pleas, which state in substance that the wharf-boat mentioned in the declaration was not built for the purpose of navigating the Mississippi river, but was stationary and used as a dwelling-house and store-house, wherein to retail steam-boat stores, spirits, provisions and merchandize to all persons wishing to buy; that the said boat at the time mentioned in the declaration, and for a long time before, had been confined to the east bank of the Mississippi river, opposite the town of Memphis, for the purpose aforesaid; that the bank where said boat was confined had been dedicated by the proprietors and owners of the land to the public as a public landing; that said wharf-boat was of the length of one hundred feet and of the breadth of thirty feet, and was kept confined to said landing by cables and spars permanently for the purpose aforesaid, by means whereof the citizens aforesaid could not pass and repass and navigate with their vessels in and along that side of the river and common highway as they were before used to do, and still of right ought to do, without danger, to the great damage and common nuisance of all citizens navigating said river. And the injury to the said wharf-boat was sustained by reason of its position so unlawfully in the stream, and by reason that the Wm. L. Robeson, without the orders and against the will of the defendant, in attempting to round to to effect a landing above said wharf-boat, was driven up against the plaintiffs' wharf-boat without any intention of the defendant to injure the said boat of the plaintiffs, and in the exercise of his lawful right to navigate said stream.

To these pleas the plaintiffs replied that said wharf-boat was erected by the license and permission of the corporate authorities of the town of Memphis, and was kept as a wharf-boat for the landing and convenience of loading and unloading steam-boats and other water craft passing up and down the river; that a bar had formed by the gradual accumulation of alluvial soil on the east side of said river in front of

JACKSON,
April, 1840.

Flicher
v
Hart.

JACKSON,
April, 1840.

Pilcher
v
Hart.

the town of Memphis, extending from the mouth of Wolf river, above said town, to a point below said landing, where said wharf-boat was erected and situate, which obstructed and prevented steam-boats and other large water craft from landing with safety or convenience; that said wharf-boat was fastened and permanently secured to the bank, and anchored in the edge of the water of said river; was a fine wharf and landing for steam-boats and other craft navigating said river, without which steam-boats could not make a convenient landing at the point where said wharf-boat was fastened; that said wharf-boat did not in the least degree injure the navigation of said river, or obstruct the free passage of steam-boats and other water craft; that said wharf-boat extended no further in the river than to the deep water, or than it ought to go for public convenience, and that the river at that point is one mile wide. The plaintiffs say the defendant, without the cause mentioned in his said pleas, but negligently in landing the Wm. L. Robeson, did commit the injury complained of against him, &c.

To this replication the defendant demurred, and for causes assigned the following: First, that the replication is double; second, it is uncertain; and third, that it is argumentative and contains no traverse to the pleas.

The demurrer was overruled and the cause was tried before a jury, who rendered a verdict for the plaintiffs of four thousand dollars. A motion was made for a new trial and overruled, and an appeal in error prosecuted to this court.

It is insisted by the defendant's counsel that the plaintiffs' wharf-boat which was destroyed was a nuisance, and that the defendant was not bound to take the same care to prevent his boat from running foul of and destroying it that he would have been required to take to prevent a like destruction of other water craft lawfully in the river.

This question is made in the defendant's second and third pleas, and had issue been taken on them there would have been some difficulty in its decision. There is, so far as we are advised, an entire absence of authority upon the point, but upon principle it would seem that though a man may not willfully destroy the property of another, although it be

a nuisance, yet he should not be held to so strict an accountability for its unintentional destruction as would be visited upon him for a like destruction of property in the lawful use and possession of its owner. But the replication of the plaintiffs avoids this issue and alleges that his wharf-boat was not a nuisance; because although it was in the Mississippi river, yet it did not obstruct the navigation thereof, but on the contrary was of great use and benefit to said navigation by furnishing the means of landing and loading and unloading steam-boats and other water craft at Memphis, when, by reason of a sand bar at said landing, steam-boats could not conveniently land.

JACKSON,
April, 1840.

Pitcher
v
Hart.

The question is thus raised whether the plaintiffs' wharf-boat was a nuisance or not. A nuisance is any annoyance, hurt, inconvenience or damage. 3 Bl. Com. 216: 4 Bl. Com. 167. The erection of a wharf-boat would often become a nuisance if it were not for the countervailing benefits afforded by it; for if it essentially impair the public easement in a stream it is a nuisance. 3 Kent's Com. 332. But whether the erection of a wharf-boat be a nuisance or not, is a question of fact which must be left to the jury. 3 Kent, 430: *The King vs. Russell*, 6 Barn. and Cress. 566: 13 E. C. L. R. 254. For if the navigation be not impeded by such erection it can be no injury to the public, and therefore would not be a nuisance. So if the public advantage greatly overbalance any slight inconvenience that may be produced, it is no nuisance. Ang. on Tide Water, 129, *et seq.* 13 Eng. Common Law Rep. 254. In the case of *The King vs. Russell* (6 Barn. and Cress. 566,) it appeared the defendants were the owners and occupiers of a coal mine at Wall's End, on the north side of the river Tyne. For the purpose of shipping their coals they had caused to be erected two staiths. These erections consist of piles (technically called geers) driven into the bed of the river, on the top of which a platform or rail-way is laid. The coal wagons pass along this rail-way, and at the end are lowered by means of a machine called a drop, into the hold of the vessel. The coal is there deposited and the wagons raised up again by the machine and placed on the rail-way. One of these staiths ex-

JACKSON,
April, 1840.

Pilcher
v
Hart.

tended nearly one hundred and fifty feet and the other one hundred and thirty feet from high water mark into the river, and each of them extended a few feet beyond low water mark. The drops when let down extended forty feet further, and ships when taking in their cargoes were obliged to lie at that distance from the staiths; but the drops when drawn up did not occasion any obstruction to the navigation. When ships are not laden at staiths the coal is first taken on board of small craft called keels, and cast by hand from the keels into the ships. When ships are laden in this manner they generally have a keel lying at each side, and they occupy a greater space in the river than when laden by means of the staiths and drops, and their cargoes cannot be put on board in less than double the time. The expense of shipping coal in this manner is greater and the coal is in worse condition than when shipped by means of the staiths. It was proved that the staiths indicted occasioned, at particular times of tide, a considerable obstruction to small craft navigating against the stream, and for some time before and after high water occupied a considerable space which would otherwise be navigable by large vessels; but if there were no staiths the number of keels used on the Tyne would be greatly increased, and the river would be very much crowded with them.

Holroyd, J. said: "Ships must lie, if not at the staiths, in the channel of the river with their loading keels. So in other trades the ships lie at the wharfs or elsewhere in the river or port to load and unload, and their obstruction to others is or is not, as well as the erection of the wharf itself, a nuisance to the navigation, in like manner as the staiths or geers themselves, in the coal trade, are or are not nuisances according to circumstances. Whether they are so or not is dependent upon circumstances, and it is therefore, according to Lord Hale, a question of fact for the jury." As the jury had found that these staiths were no nuisance a new trial was refused.

This case is much stronger than the one now before the court. The staiths were erected for the private benefit of the owner, and actually obstructed to some extent the navi-

gation of the river, but they were of great public benefit and therefore were no nuisance.

JACKSON,
April, 1840.

Fletcher
v
Hart.

In this case the replication alleges that the navigation of the river is not obstructed, and that although the wharf-boat was erected for the private benefit of the owners, yet the public advantage was greatly promoted. When a great public benefit results from the abridgment of the right of passage, the great public benefit makes that abridgment no nuisance. It was therefore a question for the jury to say from the facts of the case, first, whether there was any abridgment of the right of navigating the Mississippi river by the erection of this wharf-boat; and if there was such abridgment, whether there was such public benefit as to constitute that abridgment no nuisance. We think the evidence supports the replication, and had the charge of the court been unexceptionable would have justified the jury in finding the verdict they have rendered in the cause. But we think his honor misdirected the jury in that part of the charge in which he says that "if the defendant expressly or by implication assented to the establishment of the boat at the place where it lay, he could not defend himself from the consequences of having negligently destroyed it together with the goods and property on board, by now asserting it to be a nuisance, whatever it might be so far as the public was concerned. His using the boat as a place of landing and procuring supplies, &c. would raise a presumption of his assent."

"We do not think that the assent of the defendant to the erection of a nuisance in the river would take away his right to abate it afterwards if he thought proper. And it was certainly going too far to say that his landing at and procuring supplies from this wharf-boat raised a presumption that he had assented to its unlawful erection. But it is said this charge was uncalled for, and that the evidence would have authorized the verdict if it had not been given, and therefore the court should not reverse the judgment. This is not the character of cases for the application of the principle here contended for. In this case the question of nuisance or no nuisance is an inquiry for the jury. They must find

JACKSON,
April, 1840.

Pilcher
v
Hart.

from the proof what is the fact. But we cannot know whether they considered or acted on the evidence in relation to that question; certainly upon the charge above quoted they would have been authorized to find the same verdict by finding the fact that the defendant had "landed at this boat and procured supplies." It may be, therefore, that the jury were misled by the charge of the court, and that they did not consider the evidence in reference to the true issue; and this was most probably the case, as it would have shortened and greatly simplified their investigation. Although, therefore, we think the evidence would have justified the verdict, still we cannot support it without ourselves becoming judges of the fact.

As to the special causes of demurrer to the replication, it may be observed that there is no duplicity in it. For although there are several distinct facts stated, yet they do not constitute distinct answers to the pleas, but all tend to show that although the boat was in the river as stated in the pleas, yet it was there under such circumstances as showed it to be no nuisance. But if there are any facts that do not tend to that point, (such as the corporation license, &c.) they are not answers to the pleas, and therefore are to be disregarded. We think the replication is well pleaded, and that the demurrer was properly overruled. 1 Chitty, 556-7, 501-2.

Let the judgment be reversed and the cause remanded for another trial.

EWING vs. ARTHUR and TOBY.

JACKSON,
April, 1840.Ewing
v
Arthur.

Arthur sold town lots to Toby and took his three several promissory notes therefor, reserving a lien for the payment of them; these lots were, however, subject to a lien for the satisfaction of certain claims held by Ewing; whereupon Arthur and Ewing entered into an agreement, by which Arthur assigned to Ewing two of the notes of Toby, the agreement and the assignment both stating that Ewing was to hold a lien on the lots for the satisfaction of the notes, and by which Ewing relinquished his original lien: Held, on a bill filed by Ewing to subject the lots to sale for the satisfaction of the notes assigned to him, that the notes so assigned were not entitled to any priority of satisfaction.

Where real estate is sold and promissory notes are taken for the payment of the purchase money, retaining a lien for the payment thereof, and some of them are assigned with the lien and others retained: Held, that there being a general lien reserved for the satisfaction of all of them, if there be not in such contract of assignment an indication of an intention to give the assigned notes a preference, none will be given, but the property will be sold for the satisfaction of all the notes, *pro rata*, if there be a deficiency.

Where there is an agreement to set apart a particular fund for the satisfaction of a particular creditor, such agreement raises a trust and creates a lien upon such fund for the satisfaction of said creditor.

The facts of this case are specially and fully set forth in the opinion of the court:

Fitzgerald, for complainant.

John H. Dunlap, for defendant, Arthur.

GREEN, J. delivered the opinion of the court.

The complainant and the defendant, Arthur, entered into the following agreement, viz: "James P. Peters having heretofore purchased of John C. Hamilton a certain tavern and lots in Dresden, Tennessee, and having given to him sundry notes and obligations which T. Cooney, as administrator of John C. Hamilton, held in his possession, to wit: one obligation to pay Charlton for Hamilton seven hundred dollars; also one obligation to convey to J. C. Hamilton one-half of a certain tract of land of eight hundred acres, known as the Solomon Cotton tract, lying in Weakley county; and there being one other claim in favor of Jesse Edmondson for carpenter's work done on said house; all of which claims are

JACKSON,
April, 1840.

Ewing
v
Arthur.

centered in Nathaniel A. Ewing; and whereas, I have this day conveyed by bond, first as the agent of James P. Peters, and from myself, the said property to Mr. A. Toby for the sum of three thousand four hundred dollars, to be paid as follows, viz: five hundred dollars 1st January, 1838; one thousand four hundred and fifty dollars 1st January, 1839; and one thousand four hundred and fifty dollars 1st January, 1840; the two last bearing interest from the date. Now it is understood and agreed on by the parties, and signed that the said three notes from Albert Toby to the said William Arthur are to remain in the hands of T. Cooney, of Paris, Tennessee, until the said N. A. Ewing and James P. Peters settle, and until the end of any suit for adjudication of said claims that said Ewing may hereafter bring or institute against the said James P. Peters; and all that may be so recovered by said suit or settlement is to be paid out of said Toby's notes, for the payment of which a lien on said tavern and out lots is held by said Arthur. And for and in consideration of the premises, the said N. A. Ewing does hereby bargain and sell, and by these presents do bargain, sell, alien, convey and deliver unto the said William Arthur all the lien he may have to said property, viz: No. 10, in Dresden, Tennessee, and the eastern halves of lots No. 40, 41, 42, used as stable lots to said tavern lot by virtue of said claims, and all right he may have to the same by deed of conveyance to him from T. Cooney and Dudley Jennings bearing date Oct. 7th, 1837. Witness our hands and seals this 18th November, 1837.

WILL. ARTHUR, (Seal.)

N. A. EWING, (Seal.)"

After this contract was executed Ewing and Peters had a settlement, and Peters falling in debt two thousand and eighty-seven dollars and eighty-five cents, Arthur assigned to Ewing the note on Toby for five hundred dollars and the one for one thousand four hundred and fifty dollars, payable 1st January, 1839, and executed his own obligation to pay Ewing one hundred and seven dollars and eighty-five cents out of the one thousand four hundred and fifty dollar note on Toby, due the 1st January, 1840; when the same should be collected.

The assignment on the said notes is as follows:

JACKSON,
April, 1846.

"I assign the within to N. A. Ewing without other recourse on me than the lien on the property in Dresden, for which the note was given.
WILL. ARTHUR."

Ewing
v
Arthur

The notes which had been assigned to Ewing having fallen due and being unpaid, he filed this bill against Toby and Arthur to subject the property to be sold for their satisfaction.

The only question in the case is, whether the proceeds of the sale of the property ought to be applied first to the payment of Ewing's entire claim, or whether the said proceeds shall be apportioned, *pro rata*, among the several holders of Toby's notes. It will be seen in the agreement of the 18th of November, 1837, between Arthur and Ewing, that Arthur undertook to pay out of Toby's notes whatever amount Peters should be indebted to Ewing, and Ewing, in consideration thereof, conveyed to Arthur all the lien he had to said property by virtue of his ownership of the claims recited in the agreement, and also all the right he had to the same by virtue of a deed of conveyance to him from T. Cooney and Dudley Jennings. He thus expressly parts with all the lien he had upon the property by reason of the non-payment of the purchase money to him, and contents himself with the recitation that Arthur had retained a lien upon the property to secure the purchase money from Toby, whose notes were to be assigned to him. This, we think, is the only construction of which this agreement is susceptible; and if it should appear to have been an ill advised contract, in which he might lose and could not gain any thing, still we could not alter the agreement of the parties and settle their rights otherwise than according to the stipulations of their contract. But it by no means appears that the complainant has made an injudicious bargain; he was entitled to have the decree for about four hundred and fifty dollars satisfied, which he had purchased from Cooney and Jennings, and which constituted the balance of the purchase money due from Peters, and he had become entitled to the claim of Edmondson, the carpenter, of about three hundred and fifty dollars; for this eight hundred dollars there was a lien upon the property, and if it had been sold under the decree without any private

JACKSON,
April, 1840.

Ewing
v
Arthur.

contract with Arthur, this eight hundred dollars is all that he could have recovered or that could have been secured to him by the sale of the property. The obligation of Peters to convey to Hamilton the one-half of an eight hundred acre tract of land, of which the complainant was assignee, formed no lien upon the property although it was given in part consideration for the purchase of it. It was no money demand upon Peters, but a covenant to convey other land. This land Hamilton had agreed to take as part payment for the lots in Dresden. If Peters failed to convey he was liable to an action for damages, but certainly the damages which might have been recovered would have formed no lien on the lot; the recovery might have been twice as much or not half so much as Hamilton agreed to give for the land, and could not therefore be part of the purchase money due for the lot; it was in fact an exchange of property. Hamilton executing his bond for a title to the lots, and Peters giving his bond for the half of the eight hundred acre tract of land and agreeing to pay an additional sum in money, neither Hamilton, therefore, nor Ewing, his assignee, had any lien on the lots for the claim on Peters by virtue of the bond for a title to half of the eight hundred acre tract of land. When Arthur agreed to pay out of Toby's notes whatever amount Peters should fall in debt to Ewing on account of his land, it may be, for aught that we can know, that he agreed to secure a claim which otherwise might have been disputed. If that be so there was motive enough to induce him to take the chance of Toby's responsibility, coupled with the liability of the property to pay the whole amount Toby agreed to pay to Arthur for the purchase. But be this as it may, it can have no effect in the decision of this cause, unless the meaning of the agreement be thought ambiguous. But this is not our opinion; for we think it most clearly imports an entire surrender of his lien by Ewing, and an agreement to take Toby's notes with such consequences as might attach to them. The complainant's counsel has insisted that the terms of the assignment of the notes confer an exclusive lien or a preference of satisfaction upon complainant; we do not think so. When he says he assigns the notes without other recourse

on him than the lien on the property for which they were given, Arthur manifestly only meant to place them in the same situation in Ewing's hands that they were in while he held them. The parties might probably have entertained doubt whether the mere endorsement of the notes would, as a conveyance, have transferred to the assignee the lien. Certainly there are no words used in the assignments which indicate a meaning that these notes are to have a preference over the one not assigned, should a sale of the property be necessary for their satisfaction. The cases of *Legrand vs. Hodges*, 1 Vesey, 477, and of *Yeates vs. Groves*, 1 Vesey, 280, do not change this view of the case. Those cases raised the question whether an agreement to set apart a particular fund for the payment of a particular creditor raised a trust and created a lien upon that fund in favor of such creditor. The court decided that it would; for that it was a universal maxim, that whatever persons agree concerning any particular subject, that, in a court of equity as against the party himself and any claiming under him voluntarily or with notice, raises a trust.

These cases are unquestionably supported by the well settled principles of equity, but their particular application to the facts of this case is not perceived. There is no doubt but that Ewing is entitled to a lien upon the lots in question for the payment of the notes he holds as well by the assignment on the notes as by the agreement between the parties of the 18th November, 1837. This lien is created by the express terms of the contract, and the only question is whether he is to have priority of satisfaction of the note which was retained by Arthur. The case of the *Mechanics Bank vs. The Bank of Niagara*, 9 Wend. Rep. 410, is pretty strongly in point, and at the first blush might be thought decisive of the question. But upon a critical examination of that case it will be found to differ from the one before the court in several material particulars. In that case it appeared that the Bank of Niagara held a bond and mortgage against one A. S. Clark, bearing date 1st March, 1819, given to them to secure the payment of two thousand two hundred and fifty dollars on the 28th March, 1820. By an endorsement on

JACKSON,
April, 1840.

Ewing
v
Arthur.

JACKSON,
April, 1846.

Ewing
v
Arthur.

the bond they assigned to Seth Jenkins and his assigns one thousand nine hundred and thirty-three dollars and sixty-one cents of the said bond, and authorized him to demand and receive the same, and to take all legal means for the collection of said sum, and when collected to apply the same to his or their use and benefit. Then followed a proviso in these words: "Provided always that nothing herein contained shall be so construed as to prevent the said party of the first part (i. e. the Bank of Niagara) from receiving the residue of the sum due or to become due by the within bond to the said party of the first part, nor from disposing of the same in such manner as they may deem fit;" and a further proviso that Jenkins should not commence any proceedings for the recovery of the said sum of one thousand nine hundred and thirty-three dollars and sixty-one cents until the expiration of four years; and by an endorsement on the mortgage they assigned to Jenkins the sum of one thousand nine hundred and thirty-three dollars and sixty-one cents "of the amount of the within mortgage in the particular manner described in the assignment of a certain bond accompanying this mortgage, and bearing even date with the same." The interest in the bond and mortgage thus assigned to Jenkins passed, by divers more assignments, to the Mechanics Bank on the 6th May, 1826. In May, 1827, H. B. Potter, acting as the attorney of the two banks, sold the mortgaged premises under a statutory foreclosure of the mortgage for the nominal price of one thousand three hundred and fifty dollars, and the two banks executed a deed of the premises to Potter, who, in August following, conveyed the premises to the defendants. The deed to Potter, after setting forth the mortgage, recited the assignment to Jenkins, stating that "whereas a certain interest in said indenture of mortgage was," &c. assigned to Jenkins, and then set forth the subsequent assignments down to the Mechanics Bank, proceeding thus: "who thereby became, and were and still are, joint owners with the said president, directors and company of the Bank of Niagara of the said indenture of mortgage, according to their respective interests as specified in the aforesaid assignments and the said indenture of mortgage." In

JACKSON,
April, 1840.Ewing
v
Arthur.

August, 1828, the said Bank of Niagara commenced its suit against the Mechanics Bank, and claimed to recover the proportion which the unassigned interest in the bond and mortgage bears to the proceeds of the sale with the interest accrued thereon, which together, it was admitted, amounted at the time of the trial to two hundred and eight dollars and sixty-three cents. Jenkins (the assignee of the bond and mortgage) was sworn as a witness on the part of the defendant, although objected to, and testified that in March, 1820, he, as the agent of the Bank of Hudson, went to Buffalo to obtain payment or security for a debt owing by the plaintiff to the Bank of Hudson, which had been liquidated in the preceding year at between twenty-two hundred and twenty-five hundred dollars; that the plaintiff first offered the mortgage of Clarke as security for the nominal amount of it, which he refused to accept; whereupon the assignment in the form it appeared was made, and other securities were assigned in addition, and part was paid in cash. The chief justice of the superior court charged the jury that the said plaintiff was entitled to a verdict for the said sum of two hundred and eight dollars and sixty-three cents, and that the testimony of Jenkins could not and did not vary the construction of the deeds or instruments produced in evidence. The jury found accordingly. The defendant having excepted to the charge of the judge, sued out a writ of error. The supreme court reversed the judgment of the court below and gave judgment for the defendant on the ground that "the plaintiff was indebted to the Bank of Hudson, whom Jenkins represented, and when called on for payment or security, assigned to Jenkins an interest in the bond and mortgage in question to the extent of one thousand nine hundred and thirty-three dollars and sixty-one cents, and expressly authorized him or his assigns to take all legal measures to collect the said sum, and when collected to apply it, that is the said sum, to his or their own exclusive use;" and upon the ground that, "all doubt as to the actual intention and understanding of the parties at the time of the assignment is removed by the testimony of Jenkins."

The first remark I make in relation to this case is, that it

JACKSON,
April, 1840.

Ewing
v
Arthur.

is very doubtful whether it can be sustained by a sound construction of the agreement of the parties. In the deed from the two banks to Potter it is recited that the Mechanics Bank was joint owner with the Bank of Niagara of the said indenture of mortgage "according to their respective interests, as specified in the aforesaid assignments and the said indenture of mortgage." This language seems to indicate strongly that they were to share of the proceeds of the sale, *pro rata*, according to their respective claims. But the court evidently place the decision principally upon the testimony of Jenkins. The fact of the previous indebtedness of the Bank of Niagara to the Bank of Hudson, and the fact that the Bank of Niagara had offered the mortgage of Clark as security for the nominal amount of it, which Jenkins refused to accept, showed, from the nature of the transaction, that the intention of the parties was that the parties were not to participate in the sum that might be produced from the bond and mortgage if it should amount to less than the interest assigned to Jenkins. Besides the court lay great stress upon the words of the assignment, that Jenkins and his assigns were authorized to take all legal means to collect said sum, and that the plaintiff reserved the right of disposing of the residue.

We have been thus particular in our reference to this case that it may be clearly seen upon what reasons the decision was made, and to show that the peculiar terms of the contract, as expressed by the previous indebtedness of the assignor to the assignee, governed the court in its decision, and not any general principle as applicable to such contracts. In the case before us we find none of the reasons for giving the complainant a preference of satisfaction which the court relied on in the case we have had under review. Here Arthur was not indebted to Ewing at all, and Ewing's entire claim upon the property, as we have seen, did not amount to eight hundred dollars. What reason Arthur had for agreeing to pay the amount which Peters owed Ewing we are not informed; but we cannot infer that there was any thing in the previous transactions calculated to show that the parties had a meaning different from the plain import of the words

they have used in the contract. What then is the contract? It recites that the property had been sold to Toby, and that his three notes for the payment of the purchase money had been taken and a lien had been retained upon the property sold; and it stipulates that all the amount which Ewing may recover of Peters "by suit or settlement, is to be paid out of Toby's notes" when the amount should be ascertained; the notes were assigned "without other recourse than the lien on the property." We cannot perceive in this transaction any evidence of an intention that the notes assigned should have any preference of satisfaction, should a sale of the property become necessary, over the one Arthur retained. As a lien was retained upon the property for the entire purchase money of the lots, there must be something in the contract to show an intention to give a preference to the complainant before we can be authorized to decree him priority of satisfaction. In the case of *Graham vs. M'Campbell*, decided at the present term, some of the notes for the purchase money had been assigned and some had not. The court directed the proceeds of the sale to be divided *pro rata* among all the holders of the notes. As we think there is nothing in this case to prevent the application of the same principle, we are of opinion that the property in question be sold and that the proceeds be so distributed among the several parties entitled thereto.

Let the decree be affirmed.

JACKSON,
April, 1840.

Ewing
v
Arthur

JACKSON,
April, 1840.

GRAHAM vs. SMITH.

Graham
v
Smith.

Graham, by virtue of a six hundred and forty acre warrant, made an entry, No. 45, of four hundred and fourteen acres of land, and on the same day made an entry, No. 46, of two hundred and twenty-six acres by virtue of the same warrant: Held, that entry No. 46 was void by virtue of the provisions of the act of 1821, ch. 31, and the land vacant and subject to entry.

The act of 1821, ch. 31, was made not only to prevent the laying of a satisfied and exhausted warrant upon a second tract of land, but also to prevent the appropriation of various small tracts by virtue of one large warrant.

George W. Smith filed his petition in the circuit court of Shelby county against Wherry, the entry taker, to compel him to receive certain entries which he had refused to do. John D. Graham was made defendant, and Barry, the presiding judge, ordered a peremptory mandamus to the entry taker. From this judgment Graham appealed in error to the supreme court.

The facts of the case are fully and explicitly stated in the opinion of the court.

W. T. Brown, P. M. Miller and F. P. Stanton, argued the case for Graham, the plaintiff in error, and *Austin Miller* for Smith, the defendant in error.

REESE, J. delivered the opinion of the court.

On the 7th of February, 1837, the plaintiff in error, being owner of a land warrant for six hundred and forty acres, No. 3541, issued to F. N. Burton, made in the office of the entry taker of Shelby county, an entry No. 45, which states that by virtue of part of said certificate he entered four hundred and fourteen acres of land, in said entry particularly described. On the same day, by virtue of the balance of said warrant, said Graham made an entry in said office for two hundred and twenty-six acres of land, No. 46, which is therein particularly described. These entries were by the entry taker spread upon the general plan for the county of Shelby. On the 6th of January, 1838, George W. Smith tendered to the entry taker two entries for the purpose of including the land contained in the entries of John D. Gra-

JACKSON,
April, 1846.Graham
v
Smith.

ham, No. 45 and 46, above referred to. They were rejected because interfering with said entries, No. 45 and 46. Whereupon George W. Smith filed his petition for a mandamus to John Wherry, entry taker of Shelby county, to cause him to receive and enter upon his general plan the entries of said Smith; and to that proceeding the said John D. Graham was admitted a defendant, and answers were filed by him and by the entry taker. And his honor, the circuit court judge, presiding, upon the ground that entries 45 and 46 are void, ordered and adjudged that a peremptory mandamus issue as prayed for. To reverse which order and judgment, the defendant, John D. Graham, has prosecuted his appeal in error to this court.

To determine whether the judgment of the circuit court be maintainable, we must inquire into the meaning and give a construction to the act of 1821, ch. 31. Cobbs and Haywood, (supplement) 99. The act is entitled "an act to prevent the surveyors south and west of the congressional reservation line in this State from making more than one entry on one and the same warrant, and for other purposes." And the preamble recites that "whereas it is represented to this general assembly that some surveyors have admitted more than one entry to be made on one and the same warrant, contrary to the true intent and meaning of the present law, therefore, (sec. 1) be it enacted by the general assembly of the State of Tennessee, that from and after the passing of this act, if any surveyor of this State whose district lies south and west of the congressional reservation line, do make or suffer to be made more than one entry on one and the same warrant or certificate for land, it shall be deemed a misdemeanor in office, &c. &c. That any entry hereafter made contrary to the true intent and meaning of this act shall be void to all intents and purposes." Much ingenious argument, founded on the highly penal provisions of this act and upon the construction of prior and subsequent acts, has been resorted to by the counsel of the plaintiff in error, to show that the evil to be prevented and the offence to be punished by the act before us consist in the second appropriation of a satisfied or exhausted warrant; and there is no

JACKSON,
April, 1840.

Graham
v
Smith.

doubt that that evil is intended to be guarded against, and that offence to be punished. And we have as little doubt that it was also to prevent and punish the appropriation of various small tracts by virtue of one large warrant. It is obvious, however, that the first entry of Graham for four hundred and fourteen acres, No. 45, is not within the prohibiting terms of this act, and is not declared void by its provisions. It is conceded by the counsel for George W. Smith, that four hundred and fourteen acres might be legally appropriated by a six hundred and forty acre warrant; but it is insisted that the terms used in the entry "by virtue of part" of said warrant, shows no intention of "splitting" the same, as it is called. It is not necessary to inquire whether the form of the entry be in that respect regular and proper or not. It is sufficient that such entry is not within the mischief, or the terms of the act in question. With regard to the other entry, No. 46, which is within the mischief and the terms of the act of 1821, ch. 31, the argument of the plaintiff in error to sustain it is, that a subsequent act, passed after the entry No. 46 was made, permits more than one entry to be made by virtue of the same warrant; and that No. 46, upon the passage of that act *eo instanti*, though void, revived and became a good and valid entry, without being again made. To this we cannot agree. It was void. It was a nullity; it was as if never made. Upon the passage of the act, it could give no preference to Graham's nor be an obstacle in the way of Smith's entry. The judgment will therefore be reversed as to the first entry, and a mandamus go as to the second.

INDEX.

ABATEMENT.

OF ACTION.

1. Where a suit has abated by the death of either plaintiff or defendant a new action can be brought within a year after such abatement by the act of 1715, ch. 27, sec. 6. *Norment vs. Smith*, 46.
2. OF AN INDICTMENT.
See CRIMINAL LAW.
3. OF NUISANCE.
See NUISANCE.
4. When a failure to plead in abatement waives the question of jurisdiction. *Agee vs. Dement*, 332.
5. Plea in abatement to the jurisdiction of chancery courts over the property of resident citizens. Who is a non-resident? *Smith vs. Story*, 420.

ACCOUNT.

1. Hunt devised a tract of land, some slaves and personal property to his wife during her life, and at her death, his debts being first paid, to Winbush. The tenant for life and the remainder-man agreed that the farm should be cultivated by the slaves, (which was done) and the debts paid out of the annual proceeds of the farm so cultivated: Held, that the debts were a charge upon the property devised, and in the absence of such an arrangement as was made, it would have been the duty of the administrator to have sold the property and satisfied the debts; in such an event the loss of each owner would have been in proportion to his interest in the property sold. *Hunt vs. Watkins and Winbush*, 498.
2. Where the debts of a testator are discharged by the proceeds of the estate during the existence of a life estate by arrangement with the remainder-man, the remainder-man must pay back to the representative of the tenant for life the amount so paid. *Ibid.*
3. It is the duty of the tenant for life to keep down the interest of debts charged upon the estate devised, and no more. *Ibid.*
4. Where a crop has been made upon an estate by tenant for life, who dies before it is gathered and taken to market, his or her representative is entitled to the value of such crop, deducting therefrom the cost of gathering it, taking it to market, &c. *Ibid.*
5. As to stock and personal property left by the testator, if increased in value during the existence of the estate of tenant for life, his or her representative would be entitled to such increased value. If diminished in value, his or her representative would be bound to make up such diminution. *Ibid.*
6. The representative of tenant for life is entitled to interest which accrued during the tenancy on a sum of money due testator, though not collected till after his death. *Ibid.*
7. Jurisdiction of chancery to assign dower and decree an account for damages for the detention thereof. *London vs. London*, 1.

ACCOUNT—Continued.

8. The proper mode of taking an account, as between guardian and ward, is to allow as credits to the guardian such sums as were properly paid, and where there are no vouchers produced, to hear proof and allow such sums as are reasonable for boarding, tuition, &c. *M'Alister vs. Olmstead*, 210.
9. Where the general result of an account is correct the court will not reverse the decree, though there may be some partial errors in taking it on both sides. *Ibid*.

ACKNOWLEDGMENT.

See DEED, PROBATE. *Peyton vs. Peacock*, 135. *Gaines vs. Catron*, 514.

ACTION:

See ASSUMPSIT: CASE: DEBT: DETINUE: EJECTMENT: TRESPASS, *viet armis*: TROVER.

ADMINISTRATOR.

1. The plaintiff in an issue upon the plea of fully administered may prove assets not included in the inventory, or where there is no inventory returned he may show assets in the hands of the administrator. *Marr vs. Rucker*, 348.
2. Where the jury ascertained the plaintiff's debt to be seven hundred and four dollars and ninety-six cents, and assessed his damages at three hundred and forty dollars and thirty-two cents, and upon the plea of fully administered found that the assets in the hands of the administrator greatly exceeded the debt in the plaintiff's declaration: Held, that this finding was too vague, and that the jury should have ascertained by their finding that the assets were co-extensive with the amount of the verdict. *Ibid*.
3. Gilchrist, as administrator, confessed judgment in favor of Gasquet & Co.: Held, in an action on the administration bond, against Seat as security, that such confession of judgment did not preclude such security from pleading and proving that the administrator had fully administered the estate. *Seat vs. Cannon*, 471.

ADMISSION.

1. Where defendant read a deed signed by certain persons as executors, this operated as an admission that such persons were executors in lieu of proof to that effect by plaintiff. *Wallon vs. Newsom*, 140.
2. When a party may disprove his own admissions. See FRAUD.

ADULTERY.

Under what circumstances a bar to dower. *London vs. London*, 1.

AFFIDAVIT.

See NEW TRIAL, 3, 4.

AGENT.

1. If an agent on behalf of government makes a contract, he is not individually responsible. *Enloe vs. Hall*, 303.
2. Parol agency to lease land, good. *Johnson vs. Somers*, 268.
3. See ATTORNEY IN FACT.

AGREEMENT.

1. PAROL, in regard to boundary. See FRAUDS AND PERJURIES.
2. Walton and Stewart were in litigation with regard to a tract of land; articles of agreement were entered into by which it was agreed that Stewart should have full possession of the land, reserving to Walton the one half of a mill

AGREEMENT.—Continued.

- site: Held that these articles of agreement conveyed no title whatever to Stewart and did not estop Walton from asserting any subsequently acquired rights against Stewart or any purchaser from him. *Walton vs. Newsom*, 140.
3. Such articles did not constitute Stewart the tenant of Walton; they simply adjusted a disputed possession. *Ibid.*
 4. SEALED: How far it may be altered by parol proof. See EVIDENCE.
 5. IN WRITING, in regard to real estate: when void by reason of its uncertainty. See FRAUDS AND PERJURIES.
 6. Agreement by parol not contained in the written agreement made at the same time, not binding on the parties. *Ross vs. Carter and Brewer*, 415.
 7. A parol condition not inserted in a written agreement by fraud or mistake, will be sustained, but the proof must be full and conclusive. *Perry vs. Pearson and Anderson*, 431.
 8. Arthur sold town lots to Toby and took his three several promissory notes therefor, reserving a lien for the payment of them; these lots were, however, subject to a lien for the satisfaction of certain claims held by Ewing; whereupon Arthur and Ewing entered into an agreement, by which Arthur assigned to Ewing two of the notes of Toby; the agreement and assignment both stating that Ewing was to hold a lien on the lots for the satisfaction of the notes and by which Ewing relinquished his original lien: Held, on a bill filed by Ewing to subject the lots to sale for the satisfaction of the notes assigned to him, that the notes so assigned were not entitled to any priority of satisfaction. *Ewing vs. Arthur and Toby*, 537.
 9. Where real estate is sold and promissory notes are taken for the payment of the purchase money, retaining a lien for the payment thereof and some of them are assigned with the lien and others retained: Held that there being a general lien reserved for the satisfaction of all of them, if there be not in such assignment an indication of an intention to give the assigned notes a preference, none will be given, but the property will be sold for the satisfaction of all the notes, *pro rata*, if there be a deficiency. *Ibid.*
 10. Where there is an agreement to set apart a particular fund for the satisfaction of a particular creditor, such agreement raises a trust and creates a lien upon such fund for the satisfaction of such creditor. *Ibid.*

AMENDMENT.

See VARIANCE.

APPEAL.

Where an appeal is taken from the judgment of the county court, making an appointment of guardian, to the circuit court, if the transcript of the record from the county court is not filed fifteen days previous to the commencement of the first term of the circuit court arising after the judgment below, the judgment of the county court, upon motion, must be affirmed; the failure to comply with the mandate of the statute precludes a rehearing and forever settles the legal rights of the contesting parties. *Gregory vs. Burnett*, et ux., 60.

ASSAULT.

A constructive assault, such as besetting the house of another, is not such an assault as is meant by sec. 52 of the act of 1829, ch. 23. There must be an actual assault on the person, coupled with a felonious intent, to make out the offence described in that section. *Evans vs. The State*, 394.

ASSETS.

See ADMINISTRATOR.

ASSIGNMENT.

1. Of notes or bills single: when in due course of trade. *Wormly vs. Lowry and Rushing*, 468.
2. Notes Assigned: when notes for payment of purchase money for real estate are entitled to priority of satisfaction over those not assigned. See AGREEMENT. *Ewing vs. Arthur and Toby*, 537.

ASSUMPSIT.

1. In an action of assumpsit against a sheriff for printer's fees for advertising tax sales, it is not necessary to produce the paper in which such tax sales were advertised. *Enloe vs. Hall*, 303.
2. The receipt of money for the use of publisher of tax sales could not be presumed from the fact that the lands were levied on and advertised for sale. *Ibid*.
3. Assumpsit for the consideration money of a parcel sale of land. See FRAUDS AND PERJURIES. *Carroway vs. Anderson*, 61.
4. Repleader not grantable in assumpsit in favor of him who made first fault in pleading. *Bledsoe vs. Chouning*, 85.
5. Assumpsit on note. What is a property contract within the provisions of act of 1807, ch. 95. *Ross vs. Carter and Brewer*, 415.
6. When a gift is complete. *Cage vs. Hogg*, 43.
7. Hull and Norment agreed that for the first year Hull's wages should be as low as possible and that after the cotton factory they were engaged in putting into operation should be started, that Hull's wages should be in proportion to the profits of the establishment: Held, that this did not amount to such a special agreement as should be set forth in the plaintiff's declaration as the measure of his damages. *Norment vs. Hull*, 320.
8. Where A sells real estate without title at the time of sale, the contract is a nullity, and the vendor may recover the purchase money paid under such agreement. *Pipkins vs. James*, 325.
9. Oliver and Pipkins bought of James some groceries, an ice house and lot; Neily made a memorandum of sale headed, "Invoice of articles purchased by Pipkins and Oliver of James." One of the items of sale was headed thus: "one ice house and lot, \$140." Held, that this contract as to the sale of the ice house and lot was void by statute of frauds, and the sum of \$140 being paid could be recovered back in assumpsit. *Ibid*.

ATTACHMENT.

1. Surplus money in the hand of a sheriff may be attached. *Atkinson vs. Tucker*, 300.
2. Attachment bill lies against property of non-resident. Who is a non-resident? *Smith vs. Story*, 420.

ATTORNEY IN FACT.

1. Where two persons, each claiming separate authority to act as attorney in fact for a third person, sign a joint deed, such joint deed cannot be regarded other than the several deeds of the parties. *Gaines vs. Catron*, 514.
2. The authority of an attorney in fact expires upon the death of the principal, and conveyances of real estate made by the attorney after the death of the principal and without knowledge of that fact, are void. *Jenkins vs. Atkins*, 294.

BANK NOTES.

1. Courts of chancery take jurisdiction to give relief in cases of lost or destroyed bonds, notes, &c. on the ground of being able to furnish more adequate indemnity to the defendant than courts of law. *Irvine vs. Planters Bank*, 145.

BANK NOTES.—*Continued.*

2. Where the issuance of certain bank notes, alleged to have been destroyed by fire, were not directly traced to the bank of which they purported to be the notes, and no description of them by date or letter given: Held, that it was not possible to give the defendants adequate indemnity, and therefore no relief could be decreed to complainant. *Ibid.*

BOND.

OF SHERIFF: motion thereupon:

See SHERIFF.

OF GUARDIAN.

See GUARDIAN.

BOUNDARIES.

1. Where there are contradictory calls, the one for an established line and the other for the course: Held, that the call for the line will control the call for the course. *McAdoo vs. Sublett*, 105.
2. Where there were two lines known as Montfort's line, and on one of those lines stood "M'Culloch's corner, a red oak:" Held, that in a deed calling for Montfort's line at M'Culloch's corner, a red oak, these words "M'Culloch's corner, a red oak," designates which of the lines was meant. *Ibid.*

BY-LAWS

1. By-laws void when in conflict with the laws of the State. *Robinson vs. M. and A. of Franklin*, 156.
2. By-laws void for oppression. *Mayor and A. of C. vs. Beasley*, 232.

CALLS: Construction of. See **BOUNDARIES.**

CAPTION.

1. In an indictment it is not necessary that it should appear in the caption that the jury were sworn; it is sufficient if it appear in the body of the indictment returned by them that they were duly sworn. *Long vs. The State*, 386.

CA. SA.

1. Where a *ca. sa.* issues for the collection of debt, damages and costs, with the bill of cost endorsed thereon, in which there are abbreviations and lumping charges, the sheriff is bound to execute the writ, notwithstanding such abbreviations and lumping charges. *Atkinson vs. Micheaux*, 312.
2. Where a clerk made a verbal request of an individual to attend to all the duties of his office in his absence, but did not appoint him his deputy, and no oath was administered to such person: Held, that he had no power to administer an oath or issue a *ca. sa.* *Ibid.*

CASE.

1. Counts in case and in trover may well be joined. *Horsely vs. Branch*, 199.
2. Where a count sets forth a special contract of hiring, to wit: that a slave hired should not be employed "in or about the water," the plaintiff must show not only an employment of the slave in or about the water, but that in such employment the injury or destruction of the slave took place. No previous conversion or subsequent destruction of the slave will sustain a finding on such a count. *Ibid.*
3. A decree in chancery vesting the title of a slave in complainant on the 9th day of July, or at any time thereafter, by payment of a specified sum to A. B. vests the legal title to the slave in complainant, and complainant is en-

CASE.—*Continued.*

- titled to the value of such slave in an action on the case, against any person who should seize and convert such slave, without the payment or tender of such sum to A. B. *Banks vs. Wilks*, 279.
4. Every proprietor of land, where not restrained by covenant or by custom, has the entire dominion of the soil and space above and below to any extent he may choose to occupy it; and in this occupation he may use his land according to his own judgment, without being answerable for the consequences to an adjoining owner, unless by such occupation he either intentionally or for want of reasonable care and diligence inflict upon him an injury. *Humes and Williams vs. Mayor, &c. of Knoxville*, 403.
 5. Where the Mayor and Aldermen of a town corporation procured a street to be excavated and graded, with a view to the improvement of the street, and in so doing did as little damage as possible, yet the property of certain individuals was injured thereby: Held, that the corporate authorities were not responsible for the consequences.
 6. See NUISANCE.
 7. See SLANDER. *Magee vs. Stark*, 506.

CHALLENGE.

1. It is too late to challenge any of the members of a jury in a criminal case, *propter defectum*, after they have been sworn to try the cause. *Ward vs. The State*, 253.
2. Where the court permitted the attorney general to challenge jurymen *propter defectum* after they were sworn and charged, and the prisoner put upon his deliverance, and they were set aside against the consent of the prisoner, and other jurymen substituted in their places, who convicted the prisoner: Held, that the prisoner was discharged. *Ibid.*

CONVERSION.

1. What amounts to conversion of a slave. *Horsey vs. Branch*, 199.

CHAMPERTY.

1. Gass sold land with covenants of warranty to Malony; Malony was sued in ejectment and Gass defended. The plaintiff recovered and Malony was evicted. Gass then took a quit claim deed for the premises from Malony, and paid Malony eight hundred dollars in discharge of his warranty. This deed was made whilst the land was adversely held by the plaintiff in the ejectment suit, and after he had held it for more than a year: Held, that the deed from Malony to Gass was champertous and void by act of 1821, ch. 66, sec. 1, and no evidence as to the fairness and good faith of the parties to such deed would rebut the presumption of champerty. *Gass vs. Malony*, 452.
2. This presumption stands until the deed is proved to have been made *bona fide* not merely between the parties, but with reference to the policy and provisions of the champerty act. *Ibid.*

CHARGE OF THE COURT.

When error in the charge of the court is or is not cause of reversal. *Pilcher vs. Hart*, 524: *Marr vs. Rucker*, 348: *Norment vs. Hull*, 320: *Jar-negan vs. Mairs and Winfield*, 473.

CLERK.

1. Deputy thereof, how qualified to act. See CA. &A.
2. See PROBATE.

COMMON-SCHOOL FUND.

See CONSTITUTIONAL LAW.

CONSTITUTIONAL LAW.

1. The legislature have the power to change the direction of a donation at any time before the donation has been appropriated or rights acquired under it. *Cage vs. Hogg*, 48.
2. The legislature have the power under the Constitution to prohibit in general the keeping of stallions and jacks for the purposes of profit in the propagation of stock, and also to prohibit in general the exhibition of shows, and yet concede these privileges to all those who apply for license and pay for the privilege the amount specified by law. *Mabry vs. Turver*, 94.
3. Where the court permitted the attorney general to challenge jurymen *propter defectum* after they had been sworn and charged, and the prisoner put upon his deliverance, and they were set aside against the consent of the prisoner, and other jurymen substituted in their places, who convicted the prisoner: Held, that the prisoner was discharged. *Ward vs. The State*, 253.

CONTEMPT.

In violating injunction. See *Vaughn vs. Law*, 123.

CONVEYANCE.

Of slaves when not fraudulent, and against whom it is fraudulent. *Twiss et al. vs. Martin's*, adm'rs. 189.

CORPORATION.

1. A tax levied by a municipal corporation may be declared void by the judiciary department for oppression. *Mayor of Columbia vs. Beasley*, 232.
2. A general allegation in defendant's plea that a by-law is unequal and oppressive, is not sufficient. The defendant must set forth and show by a specification of facts the oppressiveness and inequality of such law. *Ibid.*
3. A tax levied by a municipal corporation contrary to the laws of the land is void. *Robinson vs. Mayor, &c. of Franklin*, 156.
4. Corporations are liable in damages for injuries inflicted upon the real estates of persons by their agents as natural persons are. *Humes and William vs. Mayor, &c. of Knoxville*, 403.

CORRECTION.

Of errors in the entering of judgments. See RECORDS.

CRIMINAL LAW.

1. It is not necessary that it should appear of record that the witness, upon whose evidence an indictment has been found, was sworn in open court and sent to the grand jury to give evidence in that case. *Gilman vs. The State*, 59.
2. If the witness be not sworn in open court in fact it is error, but the defendant must plead the matter in abatement. *Ibid.*
3. When master is witness for or against his slave. See WITNESS.
4. When mistrial may be entered in the trial of a slave. See MISTRIAL.
5. Lost property is not the subject of larceny. See LARCENY. *Lawrence vs. The State*, 228.
6. It is too late to challenge any of the members of a jury in a criminal case, *propter defectum*, after they have been sworn. *Ward vs. The State*, 243.
7. When the court will discharge because the party has been once put in jeopardy of his life. See CONSTITUTIONAL LAW.
8. It is not necessary, in a presentment under the act of 1823, ch. 25, sec. 1, for treating electors for the purpose of obtaining their votes, that it should appear of record that such presentment was found on the personal knowledge of two of the grand jurors. *The State vs. Darnal*, 299.
9. Where attorney general is entitled to tax fee. See TAX FEE.

CRIMINAL LAW.—*Continued.*

10. When an indictment for horse-racing good. See *GAMING*, 2.
11. In an indictment for murder it is not necessary that it should appear in the caption that the jury were sworn: it is sufficient if it appear in the body of the indictment returned that they were duly sworn. *Long vs. State*, 386.
12. Misdemeanor by constable in selling by *fi. fa.* the only horse of the head of a family engaged in agriculture. See *MISDEMEANOR*.
13. An individual may be put upon his trial upon a presentment instead of an indictment. *Smith vs. The State*, 396. See *DRUNKENNESS*.
14. Power of court to enter mistrial. See *MISTRIAL*. See *CHALLENGE*.

CONSEQUENTIAL DAMAGES.

See *CASE 4*.

COSTS.

See *TAX FEE*.

COUNTS.

1. In case and in trover may well be joined. *Horsely vs. Branch*, 199.
2. See *CASE*. *Horsely vs. Branch*, 199.
3. When there are several counts in a declaration and a jury find for the defendant on all but one, and for the plaintiff on that: Held, that though the evidence may show a good cause of action, yet if it be inapplicable to the count on which the jury have placed their verdict, such verdict cannot be sustained. *Ibid*.

COVENANT.

1. M'Clanahan obligated himself to serve Keeble thirteen months for a stipulated compensation as an overseer. He served a portion of the time and then, by parol agreement, Harrison was substituted in the place of M'Clanahan, who served Keeble the balance of the thirteen months: Held, in an action of covenant by M'Clanahan against Keeble for his wages, that he could not allege and prove by parol that Harrison's service was substituted in lieu of his own; such an agreement discharged as to one by subsequent parol agreement cannot be enforced as to the other. *M'Clanahan vs. Keeble*, 120.
2. P. Murphey gave his covenant to Goin to re-deliver a hired slave at the end of twelve months, and at the time of the delivery an execution against W. Murphey was levied upon him: Held, that the delivery was a valid delivery and a discharge of the covenant, notwithstanding the subsisting levy. *Murphey vs. Goin*, 440.

DAMAGES.

1. The court will not set aside the verdict of a jury in a civil action on the ground that the damages are excessive unless they are flagrantly outrageous and extravagant, evincing passion, partiality or corruption: such damages as all mankind would at once pronounce unreasonable. *Boyers vs. Pratt*, 90.
2. Damages, consequential. *Humes and Williams vs. Mayor of Knoxville*, 403.
3. See *PROPERTY CONTRACT*.
4. Damages for detention of dower. See *DOWER*.
5. Damages for the conversion of a slave. *Horsely vs. Branch*, 199.
6. Damages recovered on an indictment for larceny: the value of property converted. *Lawrence vs. The State*, 228.
7. Damages in assumpsit. See *ASSUMPSIT*.

DEBT.

1. An action of debt will lie upon a bill single payable in Tennessee money, Alabama money, Brandon money, &c. *Gift vs. Hall and Simpson*, 480.
2. Where the words "Brandon money" were written on the face of a bill single payable in dollars, but below the seal, and it did not appear that the words "Brandon money" were placed on the same at the time of the execution of the instrument, it will not be regarded by the court as a part of the contract. *Ibid*.
3. The defendant should have craved oyer of the instrument and of the words written upon it, and then pleaded that they were a part of the contract; the question of fact could then have been submitted properly to the determination of a jury. *Ibid*.
4. For escape. See *CA. SA. Atkinson vs. Micheaux*, 312.
5. Due by account, before justice, when barred. *Phipps vs. Richmond*, 21.
6. For penalty in violating the by-law of corporation. *Robinson vs. Mayor and Aldermen of Franklin*, 156.
7. For tax laid by corporation. *Beasley vs. Corporation of Columbia*, 232.
8. On record *vs.* administrator. What are assets? *Marr vs. Rucker*, 348.

DEED.

1. A clerk in taking the acknowledgement of deed of bargain and sale, must allege his personal acquaintance with the bargainor, or the certificate will be defective and the deed will create no lien against a judgment creditor. *Peyton vs. Peacock*, 135.
2. If it doth not contain any description of land intended to be conveyed it will also be defective. *Gaines vs. Catron*, 514.
3. By *feme covert*, must be acknowledged by her in open court in mode prescribed by law, or it will be invalid. *Wilks vs. Fitzpatrick, et al.*, 54.
4. Power of partners to bind each other by deed. See *PARTNERS*.
5. Where a deed of trust and its authentications are exhibited to the court, the court is bound to notice its defects in a question of priority of lien, though the answer does not insist upon such defects. *Peyton vs. Peacock*, 135.
6. Shall not be varied, contradicted, enlarged, or diminished by parol. *Richardson vs. Thompson, adm'r.* 151.
7. What creates a present interest in remainder, and is not testamentary. *Johnson vs. Mitchell, et al.*, 173.

OF TRUST.

8. When not fraudulent. See *Twiss et al. vs. Martins' administrators and distributees*, 189.
9. What are the evidences of fraud in a deed as against creditors. *Jones vs. Read*, 335.

OF MORTGAGE.

10. Who are necessary parties in a bill for foreclosure thereof. See *MORTGAGE: Mims vs. Mims*, 425.
11. When a parol condition may be set up to a deed. *Perry vs. Pearson and Anderson*, 431.

OF SALE.

12. When in fraud of dower. See *DOWER: London vs. London*, 1.

OF GIFT.

13. When not in fraud of dower. See *DOWER: M'Intosh vs. Ladd*, 459.
14. When void for champerty. See *CHAMPERTY: Gass vs. Malony*, 452.
15. When a deed of conveyance estops the vendor and under what circumstances. *Jarnigan vs. Mairs and Winfield*, 473.
16. When a parol trust attaches to a deed of conveyance so as to subject real estate to *fa. fa.* against *cestui que* trust. *Smithel vs. Gray, et al.* 491.

DEMAND.

See PROPERTY CONTRACT.

DEPOSITION.

Where the reading of a deposition in equity is rejected at the hearing and no bill of exceptions is taken and filed showing the ground of such rejection, and the cause is taken up by appeal, the deposition rejected is not a part of the record, and its contents cannot be regarded. *Perry vs. Pearson and Anderson*, 431.

DEPUTATION.

See *Crocket vs. Latimer*, 272

DETINUE.

1. Detinue lies at the instance of pledgor on tender of money due pledgee. *Banks vs. Wilks*, 279.
2. See LIMITATIONS, 3, *Norment vs. Smith*, 46.

DISCOVERY.

Bill by garnishee to ascertain what payments have been made by execution debtor lies. See GARNISHEE: *Hikle vs. Currin*, 74.

DONATION.

When irrevocable. See CONSTITUTIONAL LAW. *Cage vs. Hogg*, 48.

DOWER.

1. Where a widow filed her bill charging her deceased husband with selling and conveying his land with intent to defraud her of her dower, and praying dower and damages for the detention thereof, and the chancellor submitted both the validity of the deed and the quantum of damages to a jury: Held, that the submission of the matter of damages to the jury was not in accordance with chancery practice. The validity of the deed being settled by the verdict of the jury, the court should give relief by assigning dower and taking all proper accounts between the parties. *London vs. London*, 1.
2. The finding of the jury does not preclude the court from calculating and ascertaining for itself the true amount of damages. *Ibid.*
3. The vendor of land is entitled to have it sold for the payment of purchase money, and his claim is superior to the claim of the widow of vendee to dower, she holding under title bond. *Williams vs. Woods*, 406.
4. Where a bill is filed by mortgagee for sale of mortgaged premises after death of mortgagor, it is not necessary that the widow of mortgagor should be made a party to such bill, such decree not affecting her rights. *Mims vs. Mims*, 425.
5. Conveyances of real estate by deeds of gift to children are not fraudulent against a wife's right of dower because not founded upon a valuable consideration. To render them fraudulent and void there must be an actual specific intent to defraud in the making of such conveyances. *McIntosh vs. Ladd*, 459.

DRUNKENNESS.

1. Drunkenness is an offence against good morals, and a single act is indictable.
2. The presentment charged that Robert Smith was, on the 5th of March, 1839, unlawfully, openly, publicly and notoriously drunk: Held, that this was an insufficient description of the offence and the presentment bad. *Smith vs. The State*, 396.

EJECTMENT.

1. A sale of real estate made on the second day of the term is valid, and after that void. See RETURN DAY. *Valentine vs. Cooley, et als.* 38.
2. A tenant in possession cannot become defendant in an action of ejectment, unless he enters into the common rule to confess lease, entry and ouster, and causes himself, by order of the court, to be so made. *Huddleston vs. Hughlett*, 64.
3. A writ in ejectment against the tenant in possession returned "executed," constitutes no evidence of the service of the declaration, and proof of service is necessary. *Ibid.*
4. See ADMISSION: ESTOPPEL: AGREEMENT. *Walton vs. Newsom*, 140.
5. See OCCUPANCY. *Kelly vs. Hare*, 163.
6. Adverse possession of land for seven years, by title bond, bars the suit of all persons to the extent of the boundary defined in such title bond. *Brown vs. Johnson*, 261.
7. Parol agency to lease land. See LEASE. *Johnson vs. Somers*, 263.
8. See TAX SALES. *Gardner and Mosely vs. Brown*, 354. *Anderson vs. Patton and Lowder*, 369.
9. A naked possession for seven years without color of title does not give title in fee. *Hannum vs. Wallace*, 443.
10. See CHAMPERTY. *Gass vs. Malony*, 452.
11. See PROBATE: ATTORNEY IN FACT: SURVIVORSHIP. *Gaines vs. Catron*, 514.

ENTRY.

1. When void and to what extent when made on an occupant claim. See OCCUPANT. *Kelly vs. Hare*, 163.
2. See LAND WARRANT. *Graham vs. Smith*, 546.

ESTATE.

See LIFE ESTATE.

ESTOPPEL.

What does and what does not amount to an estoppel. See *Berryhill's executors vs. M'Kee's executors and Greenway*, 31; *Wilks vs. Fitzpatrick*, 54; *Vaughn vs. Law*, 123; *Wallace vs. Newsom*, 141; *Bennet vs. Baker*, 329; *Pilcher vs. Hart*, 524.

EVIDENCE.

1. An acknowledgment by a partner after the dissolution cannot affect the rights of the co-partner. *Berryhill's executors vs. M'Kee's executors and Greenway*, 31.
2. A garnishee has a right to the answer of judgment creditor to be used as evidence in his favor to show that the debt of judgment creditor has been satisfied. *Hinkle vs. Currin*, 74.
3. The testimony of a master is competent for or against his slave on his trial for a criminal offence. *Elijah vs. The State*, 102.
4. Parol evidence is inadmissible to show that one partner had authority to bind his co-partner by deed. *Turbeville and Darden vs. Ryan*, 113.
5. Parol evidence inadmissible, at the instance of plaintiff seeking to enforce a covenant, to show that plaintiff was excused from a fulfilment of the covenants obligatory on him. *M'Chanahan vs. Keeble*, 120.
6. Where a defendant read a deed signed by particular persons as executors: Held, that it operated as an admission that they were executors in lieu of proof to that effect by the defendant. *Walton vs. Newsom*, 141.
7. Parol evidence inadmissible, both in law and equity, to enlarge, diminish, contradict or vary the terms and extent of an agreement under seal. *Richardson vs. Thompson*, 151.

EVIDENCE—Continued.

8. Where a jury find for plaintiff, on one only of several counts, though the evidence show a good cause of action, yet if it be not applicable to the count upon which the jury placed their verdict, it cannot be sustained. *Horsely vs. Branch*, 190.
9. Where a landlord gave a lease upon his land by parol, and his agent afterwards, without authority in writing, gave a written lease, and the lessor addressed a letter subsequently to the lessee recognising his possession of the premises as his lessee, it was improper for the court to have decided that such letter was written in reference to the first parol lease, and upon that assumption to have rejected the testimony. The letter was competent evidence and should have been submitted to the jury, leaving them to determine whether such letter was written in reference to the first or second. *Johnson vs. Somers*, 268.
10. In an action of assumpsit for printer's fees for publishing tax sales, it is not necessary to produce the paper in which the advertisements were made. *Enloe vs. Hall*, 303.
11. The plaintiff in an issue upon the plea of fully administered, may prove assets not included in the inventory, or where there is no inventory may show that assets came to the hands of administrator. *Marr vs. Rucker*, 348.
12. In cases of sales of land for taxes, evidence behind the judgment cannot be looked at to sustain the validity of the judgment. The judgment stands or falls upon the recitation of facts upon its face. *Anderson vs. Patton and Lowder*, 369.
13. The defendant in an execution may waive the benefit of the act allowing to poor persons one horse, mule or yoke of oxen; but in the absence of proof it will not be presumed that he waived it, but on the contrary thereof the officer indicted for violating this statute must prove the waiver. *State vs. Haggard*, 390.
14. Where it was agreed that four cents per pound should be the price at which iron should be delivered in discharge of a written contract for the delivery of iron: Held, that no evidence not contained in the written agreement bound the parties; it might however be regarded as evidence of value. *Ross vs. Carter and Brewer*, 415.
15. A parol condition to a written contract will be set up in equity when not inserted by fraud or mistake, but the evidence of such condition must be satisfactory and conclusive. *Perry vs. Pearson and Anderson*, 431.
16. Curlin instituted an action under the act of 1833, ch. 80, sec. 1, to recover the value of a horse sold by *fi. fa.* for his debts: Held, that the declaration of plaintiff that he had sold the horse to a third person was competent evidence to go to the jury, yet, if in point of fact no such sale had taken place he would be entitled to recover. *Byrd vs. Curlin*, 466.
17. Ephraim Gray purchased and paid for a lot of ground, and procured a deed to be made to H. Gray for his benefit: Held, that H. Gray held this lot as trustee of E. Gray, and that it was subject to *fi. fa.* from a court of law and that this trust could be raised by parol evidence. *Smith vs. Gray et al.* 491.
18. Where the evidence authorised the verdict, yet the verdict could not be sustained unless the court became judges of the fact: Held, that the court should reverse. *Pilcher vs. Hart*, 524.

EXECUTOR.

1. See LIMITATIONS, 3.
2. If an executor take and detain property of which his testator had possession, but no title, he will be held individually liable in detinue for the wrongful detainer. *Norment vs. Smith*, 46.

EXECUTOR—Continued.

3. Isaac Shelby died, having made his last will and appointed John Shelby his executor. John Shelby died, having appointed A. M. Shelby his executor: Held, that A. M. Shelby was the executor of the first testator; yet a failure to give bond and qualify as executor of the first estate, in pursuance of the provisions of the act of 1813, ch. 119, sec 3, was a renunciation of the executorship. *Drane vs. Baylies*, 174.
4. Where a testator appointed A his executor and the testamentary guardian of his children, with power to sell property for payment of debts, to give property to the legatees as they should come of age or marry, and to keep the balance of the property together and cultivate the farm for the support of the widow and children till the youngest came of age: Held, that after the payment of some legacies and the placing the property on the farm, A held the property as testamentary guardian and not as executor. *Ibid.*

EXHIBITS.

Where a deed and its authentications are exhibited to the court in a bill, the court is bound to notice the defects of such deed and its authentications, though the answer may not insist upon them as matter of defense. *Peyton vs. Peacock*, 135.

FELONY.

See ASSAULT: CRIMINAL LAW.

FEME-COVERT.

Her power to bind herself in regard to the transfer of a legacy due her. See HUSBAND AND WIFE, Wilks vs. Fitzpatrick, *et. al.*, 54.

FIERI FACIAS.

Ft. fa. finds personal property from its test, and any alienation made after that date is void as against the plaintiff in execution. *Crockett vs. Latimer*, 272.

2. The second day of the term is the return day of *ft. fa.* and sale of real estate after second day is void. *Valentine vs. Cooley*, 38.

FRAUD.

1. Fraudulent conveyance of real estate to defeat dower, void. *London vs. London*, 1.
2. The fact that a *feme-covert* joins her husband in the transfer of a legacy due her, for which her husband received a valuable consideration, does not make such transfer valid against her on the ground that she participates in a fraud. *Wilks vs. Fitzpatrick et al.* 54.
3. See *Twies et al. vs. Martin's distributees and administrators*, 189.
4. Fraud of trustee against *cestui que trust* by collusion with a third person. *M'Alister vs. Olmstead*, 211.
5. Where there are various considerations set forth in a deed of conveyance of real estate, and such deed is attacked on the ground of fraud, by creditors, the failure to prove such considerations furnishes the indications of fraud. *Jones vs. Read*, 335.
6. Fraudulent disposition of assets of estate by administrator. See ADMINISTRATOR, *Marr vs. Rucker*, 348.
7. A parol condition to a written contract, not inserted by fraud, will be set up in equity. *Perry vs. Pearson and Anderson*, 431.
8. To make gifts of real estate to children fraudulent against a widow's right of dower, there must be an actual specific intent to defraud in the making of such conveyances. Reasonable advancements to children by first wife are not necessarily fraudulent. *M'Intosh and wife vs. Ladd et al.* 459.

FRAUD—Continued.

9. A sale of a horse made with a view to defraud creditors, though void as to creditors, is binding between the parties to such fraudulent sale. *Byrd vs. Curlin*, 466.
10. Where a plaintiff instituted an action to recover the value of a mare by virtue of the laws passed for the benefit of poor persons, which had been sold under a *f. fa.* against him: Held, that the fraudulent sale of the mare to a third person would defeat his right of recovery: Held, also, that a declaration to that effect would be competent evidence to go to the jury, yet if in point of fact no such sale had taken place he would be entitled to recover. *Ibid.*

FRAUDS AND PERJURIES, STATUTE OF.

1. To give validity to an agreement respecting the title and boundary of land there must be a writing between the parties evidencing the terms of the agreement; but it is not necessary that, in a suit upon such agreement, the declaration should allege the agreement to be in writing; it is matter of evidence. *Carroway vs. Anderson*, 61.
2. When title to slave vests by continued possession under parol loan. *Twiss vs. Martin*, 189.
3. Parol authority good to lease land. *Johnson vs. Somers*, 268.
4. What is a sufficient memorandum of contract as to real estate be binding on the parties. *Pipkin vs. James*, 325.

GAMING.

1. Where an indictment charged the defendant with unlawfully betting two dollars upon a horse-race, which was not run upon a track or path kept for the purpose of horse-racing: Held, that an indictable offence was charged. *State vs. Posey*, 384.
2. It is indictable by the statutes of this State to bet upon a match at cock-fighting. *Bagley vs. The State*, 486.
3. The statutes made to suppress gaming are, by the provisions of the act of 1824, ch. 5, sec. 5, to be construed remedially, and therefore certainty to a common intent is all that is required in charging the offence of gaming. *Id.*
4. The indictment charges that the defendant did unlawfully game, bet and hazard upon a match at cock-fighting a valuable thing, to wit, &c. Held, by the court, that allegation charged the game with sufficient certainty, and also charged with sufficient certainty that the game was played. *Id.*

GARNISHEE.

1. A garnishee has a right to file his bill for discovery against the execution creditor and compel him to say whether his judgment against the debtor has not been satisfied in whole or in part, and to use the answer as evidence in the motion against himself. *Hinkle vs. Currin*, 74.
2. It is not necessary that a bill for discovery should set out particularly the pleadings in a cause which is pending at law so as to show what precise issues are made by the parties. It is sufficient if the bill so describe the case that the court of chancery can see that an appropriate issue may be made. *Ibid.*
3. Grant when void. See **OCCUPANT**. *Kelly vs. Hare*, 163.

GUARDIAN.

1. Guardian testamentary. See **EXECUTOR**. *Drau vs. Bayles, et al.*, 174.
2. M'Alister, by will, appointed Nichol guardian of his children and executor, and died. Nichol qualified as executor, but did not take upon himself the duties of guardian; but, after acting as executor of the will six years, renounced the guardianship. Olmstead was appointed guardian

GUARDIAN—Continued.

- and gave a full acquittance to Nichol for the entire estate: Held, that the appointment of Olmstead was legal and valid, and that though Nichol was named guardian in the will, and may have done an act appropriate to the character of guardian, that did not make him such. *M'Alister vs. Olmstead*, 210.
3. One of the heirs died without issue, and no letters of administration were ever taken out upon his estate. Olmstead received his portion as guardian: Held, that Olmstead was liable for all that he received as the property of his wards. The guardian is not permitted to contest the validity of his wards' title to the estate which he received as belonging to them. Whatever he received, he is bound to account for. *Ibid.*
 4. The securities of a guardian are liable to the full extent of his obligation. *Id.*
 5. Perkins and Olmstead drew a joint bill on a commission house for the benefit of Olmstead. Perkins paid the money and prayed that it might be allowed as a set off against the claims of complainant: Held, that it not appearing that it was agreed at the time the draft was drawn that Perkins should pay it, and that the payment should go towards the discharge of his bond in the hands of the guardian, the credit could not be allowed. *Ibid.*
 6. If Perkins advanced this money for the private purposes of Olmstead when he knew that Olmstead was insolvent, with an agreement that it should be applied in extinguishment of a debt due to him as trustee, this would constitute Perkins *particeps* in a fraud upon the complainants, and he would be held liable for the amount, not withstanding the agreement that it should be considered as a payment. *Ibid.*

HORSE-RACING.

When indictable. See GAMING.

HUSBAND AND WIFE.

1. In order to bind a wife by a transfer of a legacy due her she must be privily examined in court touching her consent to such transfer. *Wilks vs. Fitzpatrick, et als*, 54.
2. The fact that a wife joins her husband in the transfer of a legacy, for which her husband receives a valuable consideration, does not make such transfer valid against her on the ground that she participates in a fraud. The transferee is bound to know what legal rights he acquires, and what rights the law permits her to set up. *Ibid.*

INDICTMENT.

1. It is not necessary that it should appear of record that the witness, upon whose evidence an indictment for gaming has been found, was sworn in open court and sent to the grand jury to give evidence. *Gilman vs. The State*, 59.
2. If the witness be not sworn in open court it is error, but the defendant must plead the matter in abatement. *Ibid.*
3. See PRESENTMENT.
4. Where an indictment charged the defendant with unlawfully betting two dollars upon a horse-race, which was not run upon a track or path made or kept for the purpose of horse-racing: Held, that an indictable offence was charged. *State vs. Posey*, 384.
5. See CAPTION.
6. An individual may be put upon his trial upon a presentment instead of upon an indictment. *Smith vs. State* 396.
7. What is sufficient certainty in charging the offence of gaming. See GAMING.

INSURANCE.

1. Where goods are insured against "thieves," the insurers are not liable for loss by simple theft but for loss by robbery only. *Marshall vs. Insurance Company*, 99.
2. To lash a flat-boat, descending the Mississippi, laden with produce, to a steam-boat to be towed, is a departure from and a violation of the contract of insurance. *Stewart vs. Tennessee Marine and Fire Insurance Company*, 242.
3. But if, after a peril insured against has been encountered by the flat-boat, as, for example, collision with a steam-boat, the master, believing the danger of immediate loss to be imminent, cause his boat to be lashed to a steam-boat to be towed to the nearest landing, though this enhance the danger and contribute to a loss, yet if honestly intended by the master, the underwriters will not be thereby discharged. For, in such circumstances, the master is the agent of all concerned, underwriters as well as owners, and his errors of judgment will not discharge the former. *Ibid.*
4. Otherwise, if, after the injury, the boat is able to sail and does sail to a landing, and repairs are there omitted by the master as unnecessary, or repairs being impracticable, he omit to tranship the cargo, which is lost by reason of the injury to the boat. For, in such case the master is agent of the owners who must bear losses arising from his negligence, unskillfulness or errors of judgment. *Ibid.*
5. It is not barratry in the master to omit to make practicable repairs, or to tranship the cargo, or to deviate, unless, in so acting or omitting to act, his purpose was to injure the owners. *Ibid.*

JUDGMENT.

A judgment of justice entered up in the following words, "judgment in favor of plaintiff for sixty-one dollars and eighty-three cents and costs," is a valid judgment in conformity with the warrant and against all the defendants therein named. *Parker and Collier vs. Swan*, 80.

JUDGMENT BY MOTION. See MOTION.

JURISDICTION.

1. Where a court or justice has no jurisdiction of the subject matter in dispute, such want of jurisdiction cannot be waived by appearance, plea, consent, or in any way whatever, and any judgment rendered in such case must be void to all intents and purposes. *Agee vs. Dement*, 332.
2. Where a court or justice has jurisdiction of the subject matter, but not of the person, such want of jurisdiction of the person may be waived by consent, or by plea to the merits, and cannot afterwards be asserted. *Ibid.*
3. Where a warrant was returned for trial before a justice legally competent to try such warrant, and such justice transferred it to the jurisdiction of another justice: Held, that such transfer, without the consent of plaintiff and defendant, was illegal, yet if the party, plaintiff or defendant objecting thereto, did not plead in abatement, but pleaded to the merits, it amounted to a waiver, and the judgment rendered by such justice would be valid. *Ibid.*
4. The recitation of what facts are necessary to give jurisdiction in cases of motion by security against principal. See SECURITY. *Jones vs. Read*, 335.
5. On what facts dependent in cases of tax sales. See TAX SALES. *Gardner and Mosely vs. Brown*, 354. *Anderson vs. Patton and Lowder*, 369.

JURISDICTION OF CHANCERY COURTS.

1. In assigning dower and taking accounts between the parties. *London vs. London*, 1.

JURISDICTION OF CHANCERY COURT.—*Continued.*

2. To decree contribution between partners, and in what case this power will not be exercised. *Berryhill's, ex'rs. vs. M'Kee's, ex'rs. & Greenway*, 31.
3. In protecting *femes covert* against improper assignments of their legacies. *Wilks vs. Fitzpatrick, et als.* 54.
4. To protest estates in remainder during the existence of life estate. *Deer vs. Devin*, 66.
5. To set aside agreements obtained by mistake or fraud. *M'Adoo vs. Sublett*, 105.
6. To abate nuisances and punish contempts for violating its decrees. *Vaughn vs. Law*, 123.
7. To set aside deeds for want of due probate and to enforce prior liens. *Peyton vs. Peacock*, 137.
8. To give relief in cases of lost bonds, notes, &c. *Irwin vs. Planters Bank*, 145.
9. To sustain a reversion by parol after the determination of a life estate in slaves in case of a conveyance purporting on its face to be absolute. *Richardson vs. Thompson's adm'r.* 151.
10. In appointing persons to carry into effect the trusts of a will. *Drane vs. Bayliss, et ux*, 174.
11. To decree an account against administrators at the instance of creditors, and to subject slaves fraudulently conveyed to sale for satisfaction of creditors. *Twiss, et als. vs. Martin's adm'r.* 189.
12. To decree an account against guardians and securities at the instance of ward, and to remove unsafe and fraudulent guardians. *M'Alister vs. Olmstead, et als.* 210.
13. In decreeing specific performance. *Jenkins vs. Atkins*, 295.
14. In enforcing judgments at law declaring conveyances fraudulent, &c. *Jones vs. Read*, 335.
15. To subject real estate to sale for satisfaction of purchase money against widow of vendor. *Williams vs. Woods*, 408.
16. To attach property of non-resident debtors for satisfaction of debt. *Smith vs. Story*, 420.
17. To decree sale of mortgaged premises against the widow of mortgagor in favor of mortgagee. *Mims vs. Mims*, 425.
18. To set up parol conditions, to written contracts, not inserted in the same, in fraud of contracting parties. *Perry vs. Pearson & Anderson*, 431.
19. To declare deeds of gift fraudulent as against right of dower, and to assign dower, &c. *McIntosh, et ux, vs. Ladd, et als.*, 459.
20. In aiding the enforcement of legal rights, and in setting up parol trusts. *Smitheal vs. Gray*, 491.
21. In decreeing account between representative of tenant for life and remainder-man. *Hunt vs. Watkins and Winbush*, 498.
22. In decreeing sale of real estate for satisfaction of lien and in settling questions of conflicting lien. *Ewing vs. Arthur and Toby*, 537.

JURY.

1. When called to aid the conscience of chancellor in cases of dower. *London vs. London*, 1.
2. Misconduct of. See *NEW TRIAL*.
3. When a discharge of a jury is or is not a discharge of prisoner. See *Elijah, a slave, vs. The State*, 103. *Ward vs. The State*, 253.

LAND WARRANT.

1. Graham by virtue of 640 acre warrant made an entry, No. 45 of 414 acres of land, and on the same day made an entry No. 46 of 226 acres, by virtue of same warrant: Held, that entry No. 46 was void by virtue of the

LAND WARRANT—*Continued.*

- provisions of the act of 1821, ch. 31, and the land upon which it was attempted to be made, vacant. *Graham vs. Smith*, 546.
2. The act of 1821, ch. 31 was made not only to prevent the laying of a satisfied and exhausted warrant upon a second tract of land, but also to prevent the appropriation of various small tracts by virtue of one large warrant. *Ibid.*

LARCENY.

1. Lost property cannot be the subject of larceny. *Lawrence vs. The State* 228.
2. Muirhead placed his pocket-book upon the table of a barber's shop, there to remain till he could get a bank bill changed, and on leaving the shop he forgot to take his pocket-book, but upon missing it he immediately recollected that he had left it at the barber's shop: Held, that this pocket-book, at the time it was so left, was not "lost property" in the sense used in the law books, and was the subject of larceny. *Ibid.*

LEASE.

1. The authority of an agent to lease land for seven years, need not be in writing. *Johnson vs. Somers*, 268.
2. Where a land owner gave a lease upon his land by parol, and his agent afterwards, without authority in writing, gave a written lease, and the lessor addressed a letter subsequently to the lessee recognising his possession of the premises as his lessee, it was improper for the court to have decided that such letter was written in reference to the first parol lease, and upon that assumption to have rejected the testimony. The letter was competent evidence and should have been submitted to the jury, leaving them to determine whether such letter was written in reference to the first or second lease, and how far such letter was an approval of the act of his agent. *Ibid.*

LEGACY. Assignment of, by *feme covert*; how it can be effected. See HUSBAND and WIFE.

LEVY.

1. A description of land in a levy in these words, "seventy acres of land belonging to John Doak, lying on the waters of Stone's river," is sufficient; the title does not rest on the description in the levy; all that is necessary in the levy is some general description that will by reasonable intendment connect it with the sale and deed. *Parker and Collier vs. Swan*, 80.
2. Where land is levied on by a constable and sold by order of court the title of the purchaser relates to the time of the levy. *Ibid.*
3. A levy on land for taxes and advertisement create no presumption that the sheriff has received the printer's fees in an action of assumpsit for those fees. *Enloe vs. Hall*, 303.

LIEN.

- See LEVY, 2: DEED. FIERI FACIAS: EXHIBIT, 2. *Banks vs. Wilks*, 279.
2. On land for payment of purchase money superior to widow's right of dower. *Williams vs. Woods*, 408.
 5. See AGREEMENT. *Ewing vs. Arthur and Toby*, 537.

LIFE ESTATE.

See REMAINDER.

LIMITATION OF ACTIONS.

1. The statute of limitations of three years is not a bar to an action before a justice of the peace founded upon a simple contract, upon which an action

LIMITATION OF ACTIONS.—Continued.

- of debt might be maintained if of sufficient amount to force the parties into a court of record. *Phipps vs. Richmond*, 21.
2. The adverse possession of a slave for more than three years, vests the title with the possession. *Norment vs. Smith*, 46.
 3. The possession by the testator of property of which he had no right cannot be connected with the possession of his executor so as to enable the executor to hold by virtue of the statute of limitations. *Norment vs. Smith*, 46.
 4. Limitation upon the grant of administration. *Drane vs. Baylies et al.*, 174.
 5. Johnson held adverse possession of land for seven years by virtue of a title bond: Held, that the second section of the act of 1819, ch. 28, barred the suit of all persons to the extent of the boundaries defined in his title bond. *Brown vs. Johnson*, 261.
 6. The statute of limitations commences running in favor of a fraudulent vendee and against a surety not from the date of the payment of money by surety, but from the time of his judgment against the principal. *Jones vs. Read*, 335.
 7. When and how the statute of limitations can be used as a defence against the claims of a surety ripened into judgment by motion. *Ibid.*
 8. A fraudulent donee holding slaves as his own for three years acquires title: but the statute of limitations commences running in favor of such donee as against the creditors of the fraudulent donor from the time judgment is rendered in the State. *Marr vs. Rucker*, 348.
 9. To constitute the son the donee of the father and to enable such donee to hold slaves in fraud of the creditors of the father, there must be proof of a gift either written or verbal, accompanied by a delivery and followed by an exclusive and adverse possession for three years. *Ibid.*
 10. A naked possession of land for seven years adversely held, gives a right of possession only, not absolute title in fee. *Hannum vs. Wallace*, 443.

LOAN BY PAROL.

1. Where slaves were loaned by the father-in-law to the son-in-law by parol, and the son-in-law held the possession of them for more than five years, but that possession was not continuous but was broken by repeated restorations of the slaves to the father-in-law during that period: Held, that the property in the slaves did not vest in the son-in-law so as to subject them to the claims of the *bona fide* creditors of the son-in-law contracted during the said period of five years. *Twiss et al. vs. Martin's adm'rs*, 189.
2. Where property has continued for five unbroken years in the possession of the son-in-law, and the possession is then restored to the father-in-law, and during the continuance of the possession of the father-in-law, debts are contracted and the property is, whilst in the possession of the father-in-law, conveyed by him to a trustee for the benefit of the wife and children of the son-in-law, this deed is good against such creditors, and is fraudulent only as against the creditors whose debts are contracted during the five years possession of the son-in-law. *Ibid.*

MANDAMUS.

See **LAND WARRANT.**

MISDEMEANOR.

1. The penalty of the act of 1820, ch. 11, sec. 1, applies with equal force to violations of the acts of 1827, ch. 20, sec. 1, and 1833, ch. 80, sec. 2; therefore when any officer shall seize and sell for the satisfaction of an execution the only farm horse, mule or yoke of oxen which the head of a family engaged in agriculture may have, he is indictable for a misdemeanor in office. *The State vs. Haggard*, 390.

MISDEMEANOR.—Continued.

2. Where the defendant in the execution has but one farm horse, mule or yoke of oxen, it is not necessary that he should select or set apart such horse, mule or yoke of oxen. *Ibid.*
3. Where he has several he has the right of selection. *Ibid.*
4. The defendant in the execution may waive the benefit of the act, but in the absence of proof it will not be presumed that he does waive it: on the contrary the defendant indicted for violating the statute must prove the waiver. *Ibid.*
5. See ASSAULT: DRUNKENNESS: CRIMINAL LAW: INDICTMENT.

MISTAKE.

1. Where a party is misled by the statements of another in regard to the boundary of his land, and enters into an agreement relinquishing his rights upon the belief of such statements: Held, that the court will set aside such agreement, whether produced by mistake or fraud. *McAdoo vs. Sublett*, 105.
2. Where a parol condition to a written contract was made, but not inserted in it by fraud or mistake, the court will sustain such condition and enforce the contract as agreed on by the parties to it. *Perry vs. Pearson and Anderson*, 431.
3. Courts have the power to correct at a subsequent term the mistakes of the clerk in entering up judgments. *Farris vs. Kilpatrick*, 379. *Crutchfield vs. Stewart*, 380.

MISTRIAL.

1. On the trial of a slave for an assault with an intent to commit murder in the first degree the court have the power to discharge the jury and enter a mistrial, with the consent of such slave and the counsel employed by the master to defend him. It is not necessary that it should appear of record that the master consented to such mistrial. *Elijah, a slave vs. State* 102.
2. Where the court permitted the attorney general to challenge jurymen, *propter defectum*, after they had been sworn and charged, and they were set aside against the consent of prisoner, it operated as a discharge of the prisoner. *Ward vs. The State*, 253.

MONEY.

See DEBT.

MONEY HAD AND RECEIVED.

See ASSUMPSIT.

MORTGAGE.

1. When a bill is filed for sale of mortgaged premises and the mortgage is not registered according to law, it is not necessary to allege in the bill that there are no creditors or subsequent purchasers nor is it necessary if any exist to make them parties. *Mims vs. Mims*, 425.
2. A mortgaged lands first to Scruggs and afterwards to Mims; in a bill for sale of mortgaged premises by Mims: Held, that it was not necessary to make Scruggs a party, nor was it necessary to make the widow of mortgagor a party. *Ibid.*

MOTION.

1. Against sheriff for defalcation. See SHERIFF, 1, 2.
2. Against principal by security. See JURISDICTION. *Jones vs.*; Read 335.
3. To correct records. See MISTAKE, 3.
4. For correction of bill of costs. See TAX FEE.
5. For new trials. See NEW TRIAL.

NEW TRIAL.

1. The act of 1801, ch. 6, sec. 59, was not intended to prevent the court from granting new trials for error in the charge of the court to the jury, for error in the admission or rejection of testimony, or for the misconduct of the jury, and the like. *Turner vs. Ross*, 16.
2. If a party has obtained two new trials, and seeks to set aside the third verdict obtained against him, the record must show that one or both of the previous verdicts have been set aside from error in the charge of the court, or in the admission or rejection of testimony, or for the misconduct of the jury, or the like. *Ibid.*
3. If a jury, for the purpose of ascertaining what amount of damages shall be assessed, agree among themselves that each member of their body shall set down a sum according with his own judgment, and that the aggregate amount shall be divided by twelve and the result returned as their verdict, the verdict so ascertained and returned must be set aside and a new trial awarded. *Elledge vs. Todd*, 43.
4. The affidavit of one of the jurors is admissible evidence to establish the mode practised in fixing the amount of damages. *Ibid.*
5. The court will not set aside the verdict of a jury in a civil action on the ground that the damages are excessive, unless they are flagrantly outrageous and extravagant, evincing intemperance, passion, partiality or corruption; such damages as all mankind would at once pronounce unreasonable. *Boyers vs. Pratt*, 90.
6. Where there are several counts in a declaration and a jury find for the defendant on all but one, and for the plaintiff on that: Held, that though the evidence show a good cause of action, yet if it be inapplicable to the count on which the jury have placed their verdict, such verdict cannot be sustained. *Horsely vs. Branch*, 199.
7. Where a jury agrees that each shall specify the amount for which he is willing to return a verdict, and they add up the several sums and return the aggregate as the amount of their verdict: Held, that such verdict must be set aside. But where one of the jurors adopted this plan without consulting his fellows, and proposed the result as their verdict, to which they assented, the verdict is good. *Bennet vs. Baker*, 399.

NON-RESIDENT.

What constitutes a non-resident? See ATTACHMENT.

NON-SUIT.

A non-suit though set aside at the same term at which it is taken, operates as a discharge of witnesses. *Cochran vs. Brown and Crews*, 329.

NOTES PROMISSORY OR BILLS SINGLE.

1. A bill single assigned before due for a pre-existing debt, is not an assignment in due course of trade. *Wormly vs. Lowry and Rushing*, 468.
2. NOTES, lost or destroyed. See BANK NOTES.

NOTICE.

1. No person is protected as a subsequent purchaser, unless either by his plea or answer, he shows himself to be such by an explicit averment that he purchased for a valuable consideration, which he has paid without notice, and that he has taken a conveyance of the legal title. *Smitheal vs. Gray, et als.*, 491.
2. Where the defendant purchased a lot of ground, took a deed and paid the purchase money after the levy of a *fi. fa.* upon the lot and before the sale under a *venditioni exponas*: Held, that he had constructive notice of complainant's claim and was not an innocent purchaser. *Ibid.*

NOTICE.—*Continued.*

3. Where the defendant fails to put in an answer to a bill alleging that he was not a purchaser for a valuable consideration without notice, but that he was cognizant of all the facts and a party to the fraudulent transaction: Held, that he hereby admits the notice. *Ibid.*
4. By security to principal to put bond in suit. See SECURITY.

NUISANCE.

1. Where the legal right of complainant is clear, the existence of a nuisance manifest, and the injury of a character not to be compensated in damages, a trial at law is not necessary in order to give a court of chancery jurisdiction in such cases. *Vaughn vs. Law*, 123.
2. Mitchell erected a dam which caused the water to overflow the land of Vaughn; Vaughn, in an action at law, recovered damages against Mitchell, and by a decree in chancery based thereupon had the dam abated; Mitchell sold his land to Jones; Jones re-built the dam lower down on the same creek, so as to overflow the same land of Vaughn as high as the first dam did, and sold to Law without notice of the previous proceedings at law and equity: Held, that Law was a privy in estate by the purchase, and stood in the same situation with Mitchell, and that the judgment against Mitchell established the nuisance against him. *Ibid.*
3. Jarnigan, whose lands were overflowed by a mill which belonged to Brown's heirs, sued Johnson, the administrator of Brown, for the continuance of a nuisance, and recovered damages against him: Held, that the record of recovery was not evidence in a subsequent suit against the vendee of Brown's heirs for any purpose except to establish the fact of its own existence and the legal consequences resulting therefrom. *Jarnigan vs. Mairs and Winfield*, 473.
4. Where the charge of the court against the defendant is erroneous, but the record does not show a state of facts upon which such error could operate, it is not a cause of reversal. *Ibid.*
5. Where the court charged the jury that a record was evidence for no purpose, whereas it was evidence to establish the fact of its own existence and to show that complainant had not so acquiesced in an overflow of his premises so as to create a presumptive right to the easement in question, or to create a presumption of a grant or license to overflow: Held, that the record not showing a state of facts upon which this defence against prescription could arise, the error in the charge of the court was not therefore a just cause of reversal. *Ibid.*
6. Jarnigan built a mill-dam overflowing the land of a stranger; he then sold to Owen, and subsequently acquired title to the land of the stranger: Held, that a deed with warranty would not pass the right to overflow the land as against a stranger, but that Jarnigan, having subsequently acquired title, the right did pass as against him. It however lays upon the defendant to show in the record that the deed was without warranty, and that it therefore did not pass against him. *Ibid.*
7. It would seem that though a man may not wilfully destroy the property of another, although it may be a nuisance, yet he should not be held to so strict an accountability for its unintentional destruction as would be visited upon him for a like destruction of property in the lawful use and possession of its owner. *Pilcher vs. Hart*, 524.
8. The question as to whether any permanent erection in a navigable stream is a nuisance is a question of fact for a jury to determine, and would not be a nuisance if the general and public advantages arising from said erection greatly exceeded any slight inconvenience therefrom. *Ibid.*
9. The fact that the defendant procured his supplies from a wharf-boat pre-

NUISANCE.—Continued.

vious to his destruction of it would raise no presumption that he had assented to its unlawful location and erection; and even his assent to the erection of a nuisance would not take away his right afterwards to abate it if he thought proper. *Ibid.*

10. Where the jury were called upon to determine whether a wharf-boat permanently erected and fastened in a navigable stream was a nuisance or not, and the court below having charged the jury that the fact that the defendant, who had destroyed the wharf-boat as a nuisance, having procured his supplies therefrom previously, could not allege it to be a nuisance and destroy it as such: Held, that although the court should think that the evidence fully authorized the verdict, yet the court could not support it without becoming judges of the fact, and should therefore reverse. *Ibid.*
11. Where there are several distinct facts stated in a special replication to a plea which do not constitute distinct answers to the plea, yet all tend to make out the defence set up: Held, that the alleging of such facts does not make the replication demurrable for duplicity. *Ibid.*
12. If there are any facts stated in the replication which do not tend to that point, and are not distinct answers to the plea, they should be disregarded. *Ibid.*

OCCUPANT.

1. If land secured by occupancy be entered by and granted to another person, without notice of a design to enter the land was given by the enterer to the occupant, the entry and grant are void for so much as the occupant had in his possession at the date of the entry. *Kelly vs. Hare*, 163.
2. Although the paper title of the defendant may cover land which belongs to the plaintiff, yet the plaintiff is entitled to a verdict and judgment for so much only as is in the actual possession and occupancy of the defendant belonging to the plaintiff. *Ibid.*

PARTNERS.

1. Partners in trade, or partners in occupation or employment, can bind their co-partners in a matter which according to the usual course of dealing has reference to business transacted by the firm; but on the contrary, if a person deals with a partner in a matter not within the scope of the partnership, the intendment of the law will be that he deals with him on his private account, notwithstanding the partnership name may be used. *Crosthwait vs. Ross*, 23.
2. A partner in the practice of physic has the power to bind his co-partner by the execution of a note in the name of the firm for the purchase of all things necessary to be used by them in their vocation, such as medicines, surgical instruments, and the like, but has no power to draw bills or make notes for the purpose of raising money, money not being an article for which such a firm has a direct use. *Ibid.*
3. Ramsey executed a note to Campbell, payable at the branch bank of the State of Tennessee; Campbell endorsed the note, Berryhill endorsed the note in the style of the firm of Berryhill and M'Kee. The bank took the note in the fair course of trade, without notice of the circumstances under which it was made; a judgment was recovered in a court of law against the maker and Campbell, and against Berryhill, M'Kee and Greenway, who were accommodation endorsers. Berryhill discharged a large portion of the judgment and filed his bill for contribution: Held, that this accommodation endorsement, in a question between the partners, was not binding on M'Kee and Greenway, and that the judgment obtained by the bank furnished no evidence of the liability of M'Kee and Greenway. *Berryhill's ex'rs vs. M'Kee ex'rs and Greenway*, 31.

PARTNERS.—Continued.

4. An acknowledgment made by Greenway after the dissolution could not affect the rights of M'Kee, nor would the expression of an opinion that he was liable to the holders of the note affect the question between himself and Berryhill. *Ibid.*
5. The power which one partner has to bind his co-partner ceases on the dissolution of the firm. *Dickerson vs. Wheeler*, 51.
6. After the dissolution of the firm one partner cannot, without the assent of his co-partner, endorse a note payable to the firm so as to pass the legal title in the note to the assignee. *Ibid.*
7. No authority is given a partner by the law merchant to bind his co-partner by deed: nor does the fact that the articles of co-partnership were under seal give him such authority merely from the circumstance of their being sealed; to have this effect a special authority must be contained in the articles. *Ibid.*
8. Parol evidence is inadmissible to prove that one partner had authority under seal to bind his co-partner; nor would subsequent acts of ratification, or evidence of the manner in which he had acted in reference to other contracts of a similar character, establish the existence of such authority; its production cannot be dispensed with unless it is shown to have been lost or destroyed or otherwise beyond the control of those desiring to prove its contents. *Turbeville and Darden vs. Ryan* 113.
9. Hull and Normont agreed that for the first year Hull's wages should be as low as possible, and that after the cotton factory they were engaged in putting into operation should be started, that Hull's wages should be in proportion to the profits of the establishment: Held, that this did not amount to such a special agreement as should be set forth in plaintiff's declaration as the measure of his damages, and secondly that it did not constitute Hull and Normont partners. *Normont vs. Hull*, 320.
10. Where partners in merchandise purchase lands with their partnership funds: Held, that the right of survivorship does not exist in case of death of one of the partners, if it does not appear that the lands were held in joint tenancy for the purpose of carrying on some useful trade or manufacture or some purpose of commerce. *Gaines vs. Catron*, 514.

PLEADING.

1. Where there are several distinct facts stated in a special replication to a plea which do not constitute distinct answers to the plea, yet all tend to make out the defence set up: Held, that the alleging of such facts does not make the replication demurrable for duplicity. *Pilcher vs. Hart*, 524.
2. If there are any facts stated in the replication which do not tend to that point, and are not distinct answers to the plea, they should be disregarded. *Ibid.*
3. Where a plea is bad, and the issue is thereby rendered immaterial, it is well settled that a replender will not be awarded at the instance and in favor of the party who commits the first fault by pleading a bad plea. *Bledsoe vs. Chouning*, 85.
4. If a party to a suit receive the word "replication" for a replication, it shall be held as a replication suitable to the defence made. *Boyers vs. Pratt*, 90.
5. Counts in case and trover may well be joined. *Horsely vs. Branch*, 199.
6. A general allegation in defendant's plea, that a by-law of a corporation is oppressive, is not sufficient. *Mayor, &c. of Columbia vs. Beasley*, 232.
7. See **PARTNERS**, 9.

POLICY OF INSURANCE. See **INSURANCE**.

POOR PERSONS. See MISDEMEANOR, 1.

PRACTICE IN CHANCERY.

1. In dower. See DOWER, 1.
2. In taking account between trustee and *cestui que trust*. See ACCOUNT.
3. As to parties necessary to be made to a bill filed by mortgagee for sale of mortgaged premises. See MORTGAGE. *Mims vs. Mims*, 425.
4. On appeals, with regard to depositions rejected in the chancery court on the hearing. See DEPOSITIONS. *Perry vs. Pearson and Anderson*, 484.

PRESCRIPTION.

See NUISANCE.

PRESENTMENT.

1. Defendant in State case may be put upon his trial on a presentment. *Smith vs. State*, 396.
2. It is not necessary that on a presentment under act of 1823, ch. 25, sec. 1, for treating electors, that it should appear of record that it was found upon the information of two of the grand jurors. *State vs. Darnal*, 290.

PRIVILEGES, TAXATION OF.

See *Mabry vs. Tarver*, 94; *Robinson vs. Mayor and Aldermen of Franklin*, 156; *Mayor and Aldermen of Columbia vs. Beasley*, 232.

PRIVY IN ESTATE.

See NUISANCE.

PROBATE.

1. A certificate by a clerk of the acknowledgment of a deed by the vendor of real estate, not giving any description of the land or of the amount conveyed, is not good and such deed cannot be read. *Gaines vs. Catron*, 541.
2. Where an act of assembly was passed making valid certain certificates of probate, after the deed had been rejected in the circuit court for the insufficiency of the probate thereof: Held, that such act was void and could not cure such defects. *Ibid*.
3. See *Peyton vs. Peacock*, 135.

PROCESS.

See RETURN DAY.

PROPERTY CONTRACT.

1. A note in the following words, "Due Lincoln and Berry sixteen hundred pounds of bar iron, delivered at Elizabethton," is not a contract falling within the provisions of the act of 1807, ch. 95, as the time and place of payment are both specified. The measure of damages is the value of iron at the date of the note. *Ross vs. Carter and Brewer*, 415.
2. Where it was agreed that four cents per pound should be the price at which the iron should be estimated in the discharge of a written agreement, but such agreement was not inserted in the written agreement or note of the party: Held, that no agreement not contained in the written agreement could be given in evidence to bind the parties; the only use that could be made of the fact, that in the dealings between the parties a particular price had been uniformly agreed upon, would have been to consider it as evidence of value. *Ibid*.

PURCHASER, SUBSEQUENT.

See NOTICE: JURISDICTION OF CHANCERY COURTS.

QUANTUM MERUIT. See ASSUMPSIT.

RECORDS.

1. The circuit court affirmed the judgment of the county court and gave judgment for forty-one dollars, damages, on affirmance. Defendant appealed in error to the supreme court, where the judgment was again affirmed, and in entering up the judgment the clerk of the supreme court omitted to enter the damages aforesaid: Held, that the court had the power at a subsequent term to correct such mistake and enter judgment for the correct amount. *Farris vs. Kilpatrick*, 379.
2. Where the clerk of the supreme court entered up a judgment of affirmance in a cause in which the judgment of the court below should have been reversed, and this appeared from the written opinion filed in the papers in the cause: Held, that the court had the power, at a subsequent term, to correct the judgment so entered by mistake. *Crutchfield vs. Stewart*, 380.

REMAINDER.

1. A limitation in remainder by parol, after determination of life estate in case of a slave, is void. *Deer et ux. vs. Devin*, 66.
2. A life estate may be reserved and a valid remainder in slaves may be created by deed. *Johnson vs. Mitchell*, 168.
3. Remainderman bound to discharge incumbrances on estate devised; tenant for life only bound to keep down the interest. See ACCOUNT. *Hunt vs. Watkins and Winbush*, 498.

RENUNCIATION OF EXECUTORSHIP.

What amounts to such renunciation. See *Drane vs. Bayliss and wife*, 174.

REPLEADER.

See PLEADING.

RETURN DAY.

1. The act of 1794, ch. 1, sec. 10, providing that all writs and other process, except *subpoenas* for witnesses returnable immediately, shall be returned to the first day of the term to which the same shall be returnable, does not embrace within its spirit and meaning writs of *fiat facias*. *Valentine vs. Cooley*, 38.
2. The act of 1803, ch. 18, sec. 1, giving the remedy by motion in certain cases against any sheriff, coroner or other officer who shall fail to return any execution in his hands on the second day of the term to which the same is returnable, constitutes the second day the return day of the term; and a sale of land made on the second day of the term is a good and valid sale. *Ibid.*

REVERSION.

Where slaves are conveyed by absolute bill of sale, a reversion after the determination of the life estate cannot be set up in chancery by parol. *Richardson vs. Thompson, administrator*, 161.

SECURITY.

1. M'Kinney, the security of Polson in a bond executed to Gray, gave Gray a notice in the following words: "I wish you to collect the debt off of Polson wherein I am security. A. F. M'Kinney." Held, that this was not such a requisition forthwith to put the bond in suit, as would discharge M'Kinney in the event that Gray did not put the bond in suit. *Parrish et al. vs. Gray*, 88.

SECURITY—Continued.

2. Where a security obtains judgment against his principal by motion, such judgment must recite upon its face and assume the existence of all facts necessary to give the court jurisdiction, or it will be void. *Jones vs. Read*, 335.
3. Where a judgment by motion was obtained by security against his principal which did not recite that a judgment had been previously obtained by the creditor against the security: Held, that such judgment was void for the want of such recital. *Ibid.*
4. Where a judgment was obtained against several sureties, no one of them has the right to a separate judgment till he has paid the said judgment, or a portion thereof, and any judgment which he may so obtain, not reciting the payment of the judgment or some portion thereof, is void; though all the sureties are entitled to a joint judgment upon the rendition of the judgment against them. *Ibid.*
5. Where a judgment by motion of surety against his principal showed that more than three years had elapsed from the time of paying the money till the making of the motion: Held, that where a bill was filed to subject real estate to the satisfaction of such judgment, such objection did not render invalid the judgment, and could only have been used as a defense, if at all, to the original motion, or by writ of error to a superior court, or writ of error *coram nobis*. *Ibid.*
6. Jones paid money under a judgment obtained against him as the surety of Read in 1821; he obtained judgment by motion against Read in 1832, and filed his bill to subject real estate to sale for the satisfaction of such judgment: Held, that the statute of limitations commenced running in favor of a fraudulent vendee and against Jones from the date of his judgment by motion and not from the time of the payment of the money. *Ibid.*
7. Security of administrator not precluded from pleading fully administered by confession of judgment by administrator. See *ADMINISTRATOR*.

SET-OFF.

When not allowed against trust fund., See *M'Alister vs. Olmstead*, 210.

SCIRE FACIAS. See *WITNESS*, 2.

SHERIFF.

1. The bond executed by the sheriff for the collection and payment of State and county taxes, by virtue of the act of 1835, ch. 15, should embrace his entire term. *Mabry vs. Tarver*, 94.
2. Where the penalty of the bond of a sheriff is less than double the amount of State and county taxes assessed and to be collected for the two years of his term, a judgment by motion against such sheriff and his securities for the amount of his defalcation would be proper, notwithstanding. *Ibid.*
3. Where a person acting under a void deputation levied on property, and the property, together with the execution, was returned to the hands of the sheriff and by him sold: Held, that such sheriff was protected by such execution in a suit against him. *Ibid.*
4. Surplus moneys may be attached in his hands. *Trucker vs. Atkinson*, 300.
5. When not liable to the printer and publisher of his tax sale reports. *Hall vs. Enloe*, 303.
6. The sheriff is bound to execute a *ca. sa.* notwithstanding there are lumping charges and abbreviations in the bill of costs endorsed thereupon. *Atkinson vs. Micheaux*, 312.

SLANDER.

1. Where a slanderous charge can be collected from the words themselves, it

SLANDER—*Continued.*

- is unnecessary to make an averment as to the circumstances to the supposed existence of which the words refer. *Magee vs. Stark*, 306.
2. Words which in their obvious sense carry to the mind of the hearer the imputation of a crime are *per se* actionable, otherwise they are not. *Ibid.*
 3. The want of an allegation that the testimony upon which a charge of perjury was based was material, is cured by verdict. *Ibid.*
 4. The words "I had a law suit" necessarily implies a judicial proceeding. *Ib.*
 5. Where words spoken are capable of two constructions, the one defamatory and the other not so, it should be left to the jury to determine in what sense they were used. *Hays and wife vs. Hays*, 402.

SPECIFIC PERFORMANCE.

See **ATTORNEY IN FACT: JURISDICTION OF CHANCERY COURTS.**

SPIRITUOUS LIQUORS.

1. The by-law of the town of Franklin, prohibiting all persons from retailing spirituous liquors within the limits of the corporation under the penalty of two hundred and fifty dollars, unless the person desiring to retail spirituous liquors should obtain a license from the corporation for one year by the payment of one hundred dollars, was in direct conflict with the laws of the State, and therefore void. *Robinson vs. Mayor, &c. of Franklin*, 156.
2. Oppressive taxation of the privilege of retailing spirituous liquors. See **CORPORATION. Mayor and Aldermen of Columbia vs. Beasley**, 232.

STATUTES CONSTRUED.

1. Amendment. 1794, ch. 1, sec. 27: 1809, ch. 49, sec. 21: 79.
2. Appeals. 1794, ch. 1, sec. 66: 60.
3. Attachment. 1794, ch. 1, sec. 19. 1817, ch. 54, sec. 1: 300.
4. Attachment. 1836, ch. 43, sec. 1: 420.
5. Champerty. 1821, ch. 60, sec. 1: 457.
6. Clerks and their deputies. 1794, ch. 1, sec. 72: 312.
7. Costs, lumping charges. 1794, ch. 1, sec. 75: 312.
8. Dower. 1784, ch. 22, sec. 8. 1823, ch. 37. 1835, ch. 19, sec. 5: 408, 1.
9. Ejectment. 1801, ch. 2: 64.
10. Executors. 1813, ch. 119, sec. 3: 174.
11. Frauds and perjuries. 1801, ch. 25: 325, 268, 189.
12. Felonious assault. 1829, ch. 23, sec. 52: 394.
13. Gaming. 1824, ch. 5, sec. 3: 383. 1820, ch. 5. 1833, ch. 10: 384. 1824, ch. 5: 480.
14. Garnishment. 1811, ch. 89, sec. 1: 74.
15. Imprisonment for debt. 1831, ch. 40: 312.
16. Internal Improvement and Common School Fund. 1831, ch. 43, sec. 8. 1837, ch. 83: 48.
17. Land warrant. 1821, ch. 31: 546.
18. Limitations, 1819, ch. 28, sec. 2: 261. 1715, ch. 27, sec. 5: 22. 1715, ch. 27, sec. 5: 46. 1819, ch. 28, sec. 2. 1715, ch. 27, sec. 5: 335. 1715, ch. 27, sec. 5: 348. 1819, ch. 28, sec. 2: 443.
19. Limitation on grant of letters of administration. 1831, ch. 24, sec. 3. 1835, ch. 86, sec. 3: 174.
20. New trial. 1810, ch. 6, sec. 59: 16.
21. Occupant. 1823: 163.
22. Poor. 1833, ch. 80: 467.
23. Probate of deeds. 1831, ch. 90, sec. 2, 3. 1833, ch. 92, sec. 13. 1835, ch. 53: 135.
24. Process. 1794, ch. 1, sec. 10. 1803, ch. 18, sec. 1: 38.

STATUTES CONSTRUED—*Continued.*

- 25. Property contract. 1807, ch. 95: 415.
- 26. Security. 1809, ch. 69, sec. 1, 2, 3: 335. 1801, ch. 18, sec. 1: 28.
- 27. Sheriff. 1835, ch. 15, sec. 1, 2: 94.
- 28. Survivorship. 1784, ch. 22: 514.
- 29. Tax sales. 1805, ch. 50, sec. 2. 1813, ch. 98, sec. 16. 1819, ch. 53: 303. 1813, ch. 98: 354. 1819, ch. 53. 1826, ch. 38: 369.
- 30. Treating electors. 1823, ch. 25, sec. 1: 290.

TAXES.

See SPIRITUOUS LIQUORS: CORPORATION: SHERIFF: TAX SALES.

TAX FEE.

Where several persons were jointly indicted and jointly convicted but separate judgments were rendered against them: Held, that the clerk in making out the bills of cost should tax a fee against each defendant for the attorney general. *Penland vs. State*, 384.

TAX SALES.

- 1. Where the sheriff reported land as liable for double taxes in the name of Caleb Cross's heirs, and the land was ordered to be sold for the payment of such taxes, as the property of C. Cross's heirs, when the land in fact belonged to John Anderson at the time of such report and judgment: Held, that such judgment was void and communicated no title to a purchaser under it. *Gardner and Mosely vs. Brown*, 354.
- 2. The act of 1813, ch. 98, requires that the order of sale should set forth the number of the entry and the grant, with the specialties belonging to them, if there is both an entry and a grant; and if no grant, then the number of the entry and the specialties belonging to it. *Ibid.*
- 3. Where land is sold by judgment of the county court for the taxes, the grounds of fact upon which the jurisdiction rests must appear in such judgment, or it will be void and convey no title to the purchaser. *Anderson vs. Patton and Lowder*, 369.
- 4. The jurisdiction of the county court rests upon the following facts: First, that the land lies in the county. Second, that the taxes remain due and unpaid. Third, that there is no personal property upon which the collector can levy for the satisfaction of the taxes. *Ibid.*
- 5. If the county court in their judgment omit to assume the facts upon which their jurisdiction rests, or themselves to state their existence, but instead thereof allege that they have been communicated to them by some agent or officer of the public, then the public must have entrusted such agent or officer to make to them the communication, or their jurisdiction will not appear. *Ibid.*
- 6. If the judgment omit to state that the land lies in the county, but this fact is stated by the sheriff in his report, the judgment will be void notwithstanding, the sheriff not being the officer appointed by law to make the communication to the county court; nor will the return of the surveyor alter the case, as such return is not a part of the evidence in the case or a proceeding in it, and as the court cannot look behind the judgment for evidence to sustain its validity. *Ibid.*

TESTAMENTARY.

- 1. DEED: What is not revocable, not being testamentary. See REMAINDER. *Johnson vs. Mitchell*, 168.
- 2. GUARDIAN. See EXECUTOR. *Drane vs. Bayliss, et us*, 174. *M'Alister vs. Olmstead, et als*. 210.

TREATING ELECTORS.

See CRIMINAL LAW. *State vs. Darnal*, 290.

TROVER.

1. Horsely hired his slave to Branch with a special agreement that he should not be employed "in or about the water." The employment of the slave "in or about the water" was a conversion of him, and being subsequently destroyed by inevitable accident, Branch would be liable in trover though no injury occurred at the time of the conversion. *Horsely vs. Branch*, 199.
2. Where a slave is hired for twelve months and converted by the hirer before the twelve months expire, the owner has a right of action instantly upon the conversion and need not wait till the expiration of the twelve months; *secus*, where the conversion is by a third person. *Ibid*.
3. Counts in case and in trover may well be joined. *Ibid*.
4. Brown contracted to build Crockett a brick house at eight dollars per thousand for the brick; Crockett was to advance money to the hands employed by Brown in making the brick, which advances Crockett was to charge to Brown: Held, that the brick made by Brown under this contract were his brick till put in the house, and were subject to executions against Brown. *Crockett vs. Latimer*, 272.

TRUSTEE.

See GUARDIAN: JURISDICTION OF CHANCERY COURTS.

VERDICT.

1. What defects in pleading it cures. *Johnson vs. Planters Bank*, 77.
2. Where it must be set aside from the improper mode practised in obtaining it. *Todd vs. Elledge*, 44. *Bennett vs. Baker*, 399.

WARRANT FOR LAND.

See LAND WARRANT.

WARRANTY.

When it estops vendor. See NUISANCE.

WATER COURSE.

See NUISANCE.

WITNESS.

1. A master is a competent witness for or against his slave on his trial, on an indictment for an assault and battery with intent to commit murder in the first degree. *Elijah, a slave, vs. The State*, 102.
2. Witness is discharged by a non-suit and must be summoned again if non-suit is set aside. *Cochran vs. Brown and Crews*, 329.

WORK AND LABOR.

See ASSUMPSIT.

ERRATUM.

Page 174, line 17, for "and" read "having."

E. J. M.

